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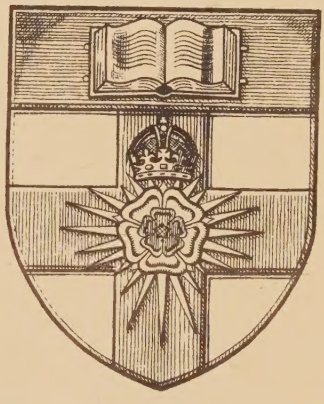

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Supreme Court of Judicature.

CASES DETERMINED IN THE

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AND IN

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AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—G. W. HEMMING, Q.C.

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VOL. XXXIV.

1887.—L. VICTORIÆ.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

1887.

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182	7 head-note	At beginning insert "*Semble*"	
466	foot-note (1)	26 Ch. D. 180	26 Ch. D. 181
625	foot-note (8)	5 Ch. D. 834, 837	7 Ch. D. 834, 837
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The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1887, will be as follows:—

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

MARTIN *v.* SPICER.

C. A.
1886
Aug. 2, 3.

[1885 M. 3051.]

Restrictive Covenant—Representations—Collateral Agreement.

S. was the owner of various houses in *Cromwell Gardens* purchased from the Commissioners of the Exhibition of 1851, in the conveyance of each of which was a covenant that he would not carry on or permit to be carried on any trade or business, but would keep the house as a private dwelling-house. *S.* let one of the houses to *M.* *S.'s* solicitor sent to *M.* a draft lease with a letter ending: "I may perhaps add that the draft is the form used for all the houses on *S.'s* estates." The draft contained a restrictive covenant of the same nature as that in the conveyance to *S.*, and against it was a note: "There is a covenant to this effect in the conveyance to *S.*" Six years afterwards *M.* negotiated with *S.* for a long lease of the same house at a high premium, and a draft agreement was sent, which contained a provision that the lease should contain such covenants on the part of the lessee as were usually inserted by the lessor in leases of his other houses in *Cromwell Gardens*. *M.'s* solicitor thereupon wrote for the form of lease used by *S.*, and a copy of a lease containing the restrictive covenant was sent, and a lease was granted to *M.* containing a similar covenant:—

Held, that the representations, made by *S.* to a person negotiating for a lease, that this was the form of lease used by *S.*, amounted not merely to a statement that this was the then form of lease, but to a collateral contract with the intending lessee, that the neighbouring property of *S.* should continue to be managed on that footing. *Held*, therefore, affirming the order of *Bacon*, V.C., that *M.* was entitled to restrain *S.* from authorizing any of the adjoining houses to be used for the purpose of trade.

BY a conveyance dated the 25th of March, 1867, the Commissioners of the Exhibition of 1851 conveyed to *John Spicer* the fee

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simple of the house No. 2, *Cromwell Gardens*, subject to a covenant that *Spicer*, his heirs or assigns, would not carry on or permit to be carried on upon the premises any trade or business, but would keep and use them for a private dwelling-house only, and would not wittingly or willingly do or suffer to be done on the premises anything which might grow to the annoyance, damage, or disturbance of any person who might be or become the tenant or occupier of any part of the hereditaments and premises at *Kensington* then or then late belonging to the Commissioners. By six similar conveyances of the same date the Commissioners conveyed to *Spicer* the houses Nos. 1, 3, 4, 5, 6, and 7, *Cromwell Gardens*, the whole seven forming one block of buildings; and each conveyance contained a restrictive covenant to the effect set out above.

In 1874 the Plaintiff took from *Spicer* a short lease of No. 2. *Spicer's* solicitor forwarded to the Plaintiff a draft lease with the following letter:—

"At the request of my client the lessor I beg to send herewith draft lease of the above premises for your approval. May I ask that you or your solicitor will kindly return same approved as early as may be convenient, as the time fixed for the completion is somewhat short. I may perhaps add that the draft is the form used for the other houses in *Cromwell Gardens*—in fact for all the houses on Mr. *Spicer's* estates."

This draft contained a covenant in the same terms as the covenant in the lease for eighty years afterwards granted to the Plaintiff, and against this covenant was a marginal note: "There is a covenant to this effect in the conveyance to Mr. *Spicer*." The lease was taken according to this draft. Afterwards in 1880 the Plaintiff negotiated with *Spicer* for a lease of the same house for eighty years at a premium of £11,000 and a ground-rent of £120, and *Spicer's* solicitors sent a draft agreement which stipulated that "the said lease shall contain such covenants, conditions and agreements on the part of the purchaser or lessee as are usually contained in leases granted by the said vendor of his other houses in *Cromwell Gardens* aforesaid, and the usual covenants by the vendor for &c." The Plaintiff's solicitors, on the 25th of September, 1880, wrote: "Please send us a copy of the form of lease which

is referred to in the draft agreement as in use on the estate, as without it we cannot peruse the draft. Perhaps the shortest plan would be for you to prepare and send us the draft lease, which could then be annexed to the agreement." *Spicer's* solicitors accordingly furnished the Plaintiff with a copy of a lease of No. 5, *Cromwell Gardens*, already granted to *Richard Shafto*, which contained a covenant to the effect that the lessee and his assigns would not use the house thereby demised or permit it to be used for the purpose of any trade or business or for any purpose whatever other than a private dwelling-house, nor do or permit or suffer any act, matter, or thing to be done therein which might be or grow to the annoyance, damage, or disturbance of *Spicer*, his heirs or assigns, or of his or their tenants, or other the owners or occupiers of lands or houses adjoining, or of any person or persons who might be or become the owner, tenant, or occupier of lands or houses adjoining, or of any part of the hereditaments at *Kensington* then or formerly belonging to the Commissioners of the Exhibition of 1851. A copy was annexed to the agreement, which was signed, and pursuant to it, *Spicer*, on the 24th of December, 1880, demised No. 2 to the Plaintiff for eighty years, in consideration of a premium of £11,000 and a yearly rent of £120—the lease containing a covenant by the Plaintiff identical with that in *Shafto's* lease.

In 1885 the Defendant *Brett*, who was promoting the formation of the *Cromwell Gardens Hotel Company*, entered into arrangements for the purchase as to three of them from *Spicer*, and as to the others from persons on whom *John Spicer's* interest had devolved, of the houses, Nos. 3, 4, 5, 6, and 7, for the purpose of converting them into an hotel.

This action was brought against *Spicer* (who was the devisee of the above *John Spicer*), *Brett*, and the company, for an injunction to restrain them from carrying on or permitting to be carried on upon any part of Nos. 3, 4, 5, 6, and 7 the trade or business of an hotel, and from using the same property or any part thereof, or suffering it to be used, otherwise than as private dwelling-houses or a private dwelling-house, and from doing or suffering to be done thereon anything which might grow to the annoyance, damage, or disturbance of the Plaintiff as tenant or occupier of No. 2.

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The action was tried by Vice-Chancellor *Bacon* on the 26th and 27th of May, 1886, and his Lordship granted a perpetual injunction restraining *Spicer*, *Brett*, and the company respectively from carrying on or "permitting" to be carried on upon any part of the property known as Nos. 3, 4, 5, 6, and 7, *Cromwell Gardens*, the trade or business of an hotel, or any other trade or business, and from using the same property or any part thereof, or "suffering" it to be used other than as private dwelling-houses or a private dwelling-house.

Spicer appealed.

Rigby, Q.C., Sir *A. Watson*, Q.C., and *E. S. Ford*, for the Appellant:—

The Plaintiff covenanted with his landlord not to use as an hotel the property demised to him. Other lessees entered into similar covenants, and the Plaintiff seeks to oblige the landlord to enforce this latter covenant. We contend that he has no right to insist on its being enforced. *Spicer* when he purchased from the Exhibition Commissioners covenanted with them that no trade or business should be carried on upon the property. The Commissioners might enforce this against *Spicer* and all persons taking from him with notice; but there is nothing to shew that they were bound to do so, or that they were unable to release the covenant. The foundation of the right in cases like this to enforce a stipulation must be contract; it is sometimes spoken of as an equity, but the basis of the right must be a contract of which the person complaining is entitled to insist on the performance. When we granted the lease to the Plaintiff we told him that it was our practice to require the insertion of a covenant against carrying on business, but we gave no undertaking to enforce it against our other lessees. What is necessary to give one covenantor a right through the covenantee against other covenantors? Is it enough to say, "this is my usual form of lease?" If that is so, it gives each lessee a power over the whole neighbourhood. Where an agreement is proved that the whole of an estate shall be managed on a certain system, then, no doubt, so long as the estate retains its character, each lessee can enforce the agreement.

[LOPES, L.J., referred to the letter stating that this was the form used for all the leases on the estate.]

That means nothing more than this: "I am only asking from you what I ask from everybody else." The lease contains no stipulation by the landlord on the subject, and all that the Plaintiff can rely upon is a letter which, if naturally interpreted, is merely a statement of a fact, not a promise. Observe how it is introduced by the way: "I may perhaps add," &c.

[COTTON, L.J.:—Does not the statement of a fact material to the value of the property about which the parties are negotiating amount to a contract?]

Not when introduced in this way. There is no evidence that the parties understood that there was a contract of this kind. The lease is silent. The Plaintiff is trying to set up a collateral agreement, not in writing, not referred to in the correspondence, and only to be made out by inference. The case is not the same as in a conveyance in fee. There the vendor parts with all his interest, and if a covenant has been entered into with him, his heirs and assigns, you are thrown out of the deed to inquire—assigns of what? since there cannot be any assigns of the property sold. That inquiry is not opened in the case of a lease, for "assigns" means assigns of the reversion in the demised property.

[COTTON, L.J.:—If I understand your argument, it is entirely opposed to *Piggott* v. *Stratton* (1).]

[*Millar*, Q.C., referred to *Western* v. *Macdermott* (2).]

We do not say that a collateral agreement cannot be inferred where there is a concluded agreement, but very strong evidence is required: *Erskine* v. *Adeane* (3).

[COTTON, L.J.:—Your argument would have more force if the action were against a lessee.]

We submit that there is not much difference. If there is an agreement, it must bind every one who takes with notice of it. In *Piggott* v. *Stratton* the grantor stated positively that he could

(1) Joh. 341; 1 D. F. & J. 33. (2) Law Rep. 2 Ch. 72.
(3) Law Rep. 8 Ch. 756.

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not do certain things; that representation was made to enhance the value of the property, and he was not allowed to falsify it. If the property in the present case was taken on the faith of this representation, it is extraordinary that the written agreement should not refer to it. A statement cannot be said to be one *dans locum contractui* when the parties enter into a written agreement not referring to it. In every one of the great estates in *London*, as the *Westminster*, *Bedford*, and *Portman* estates, it is known that there is a regular form of lease; but there is no case where one tenant has been held entitled to enforce the covenants against another. When what is relied on is only something said during a negotiation which results in a written contract, there *primâ facie* everything passing during the negotiation, if not embodied in the contract, is taken to have been abandoned. If the question of game was discussed during negotiations for a farming lease, and the lease said nothing about it, a collateral contract as to it ought not to be implied. No doubt a contract may be entered into on the faith of a representation of such a character that, if it turns out untrue, the grantee is entitled to equitable relief—*e.g.*, a positive statement that there is coal under an estate. But where the contract relates solely to the mode of enjoying the property, you expect to find in it everything by which the parties intend to be bound. Neither of the grounds on which *Piggott* v. *Stratton* (1) was decided occurs in the present case. There is no stipulation in the lease, and no representation which can be taken as misleading or as amounting to a contract. "This is my form of lease" involves no representation that it would never be altered. A collateral contract ought not to be made out by selecting bits from the negotiations.

Millar, Q.C., and *Kirby*, *contrà*, were not called upon.

COTTON, L.J.:—

This is an appeal against an order of Vice-Chancellor *Bacon* granting an injunction against the Defendants, Mr. *Spicer*, Mr. *Brett*, and the *Cromwell Gardens Hotel Company*. The only party who appeals is Mr. *Spicer*, the executor and devisee of

(1) Joh. 341; 1 D. F. & J. 33.

John Spicer, to whom were granted by the Commissioners for the Exhibition of 1851 conveyances of certain houses fronting *Cromwell Road*. The other Defendants, Mr. *Brett* and the *Cromwell Gardens Hotel Company*, were proposing to buy five of the houses in *Cromwell Road* for the purpose of converting them into an hotel, and three at least of the houses which they proposed so to convert were to be bought by them from Mr. *Spicer* for the purpose. Mr. *Martin*, the Plaintiff, holds for a term of eighty years No. 2 in *Cromwell Gardens*, which immediately adjoins the houses proposed to be converted into an hotel, and is part of the same block. The question is whether the Vice-Chancellor was right in restraining both Mr. *Spicer* and the other Defendants, the one from allowing to be converted into an hotel, and the others from converting into an hotel, the five houses in question.

The Plaintiff had originally in 1874 a short lease of his house from Mr. *Spicer*, but afterwards, in 1880, he purchased from him a term of eighty years in the same house. The Plaintiff's house and the houses proposed to be converted had been bought from the Commissioners for the Exhibition of 1851; each house was separately conveyed, but that, I think, is immaterial, and each conveyance contained a covenant restricting the purchaser, Mr. *Spicer*, from using the house conveyed by it except as a private residence, and from doing or suffering on the premises anything which might grow to the annoyance, damage, or disturbance of any owner, tenant, or occupier of any part of the hereditaments or premises at *Kensington* then or then late belonging to the Commissioners of the Exhibition of 1851, who had a large amount of ground there. *Spicer* in each of his leases, not only of houses in *Cromwell Gardens* but of his other houses in the neighbourhood, inserted a covenant not exactly in the same terms but to a similar effect. In my opinion the question turns upon this, whether, at the time when the Plaintiff bought the eighty years' term of this house as a residence, there was such a representation made to him by or on behalf of Mr. *Spicer* as amounted to a contract by Mr. *Spicer* that he would not allow his property to be used except in accordance with the covenant which I have mentioned. In 1874, when the Plaintiff took his short

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lease, a letter in these terms was sent to him by Mr. *Spicer's* solicitor:—"At the request of my client the lessor I beg to send herewith draft lease of the above premises for your approval. May I ask that you or your solicitor will kindly return the same approved as early as may be convenient, as the time fixed for the completion is somewhat short. I may perhaps add that the draft is the form used for the other houses in *Cromwell Gardens*, and in fact for all the houses on Mr. *Spicer*'s estates." He had got this property and apparently other property here. Then there was a draft sent to Mr. *Martin*, and in that draft there was a restrictive covenant, which was the same as that contained in the subsequent lease for eighty years, and in the margin there is this note:—"There is a covenant to this effect in the conveyance of these premises to Mr. *Spicer*," and that, I think, is very material. A lease was then granted containing the restrictive covenant. In 1880 there was a negotiation for a lease for eighty years, and a draft agreement was sent by Mr. *Spicer's* solicitor to the Plaintiff's solicitor which contained this clause: "The said lease shall contain such covenants, conditions, and agreements on the part of the purchaser or lessee as are usually contained in leases granted by the said vendor of his other houses in *Cromwell Gardens* aforesaid, and the usual covenants by the vendor for quiet enjoyment by the purchaser and for effecting and continuing the said insurance and for laying out insurance moneys," &c. The material part of it is the reference to the covenants usually contained in the leases granted by the vendor, *i.e.* by Mr. *Spicer*. On receiving that draft the Plaintiff's solicitor wrote: "Please send us a copy of the form of lease which is referred to in the draft agreement as in use on the estate, as without it we cannot settle the draft. Perhaps the shortest plan would be for you to prepare and send us the draft lease, which might then be annexed to the agreement." A form of lease was accordingly annexed to the agreement.

The contention on behalf of the Appellant, Mr. *Spicer*, was that the statements contained in the letter and in the contract were made only to enable the Plaintiff's solicitor to settle the form of the lease, and did not contain any representation amounting to a contract as to the management of the estate. I cannot accede to that view. We had handed up to us the bill of costs

sent in by the Appellant, who was then the solicitor of the lessor, and there we see this, "Mr. *George Spicer's* charges with reference to the preparation of the lease." "Writing Messrs. *Ashurst & Co.* with draft lease and afterwards attending them thereon and lending them draft of similar lease granted to Mr. *Shafto* and approved." But that really does not carry it further. Apart from that, the letter and the contract represent that what was sent was the form of lease which was in use on the estate, and the first letter says that this form of lease was used on all the property of Mr. *Spicer*. That really says this:—"This is how the estate is managed, there are these covenants contained in all the leases." This gentleman, when entering in 1880 into a contract for a lease for eighty years at a premium of £11,000, is told that his lease must be in accordance with the form used on the property held by Mr. *Spicer*, and the representation that this was the common form, being a statement as regards the management of the estate which must materially affect the value of the property he was going to buy, amounted, in my opinion, not simply to a statement that this was the then present form of lease, but to a contract with the intending purchaser that this would be the management of the estate of which he was going to buy a portion.

It was argued by Mr. *Rigby* that the Plaintiff asks us to introduce a new term into the contract which the parties had drawn up, but it is really a collateral contract. It is not a contract with reference to the mode in which this house is to be dealt with, but a contract binding the grantor as to how he is to deal with the remainder of his property. It is said, "If this was intended to be a contract why was it not introduced into the lease?" As a rule it is presumed not to be necessary to bind a landlord or grantor of property in respect of such a matter, but still if he makes representations about it which amount to a contract with the other party, it is not right in my opinion to refuse to enforce it simply because if the parties had thought that there would be a departure on the one side or the other from the stipulation they would have put it into the contract. In my opinion there was a representation, amounting in this case to a contract, that the property should be dealt with and managed in the way pointed out by that representation.

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I may add that the form of lease in 1874 clearly shews to my mind that the covenant was held out as being one which was not simply for the benefit of Mr. *Spicer*, the landlord, but was for the benefit of the other tenants, for it especially provides that the lessee should do nothing which should be an annoyance, nuisance, or damage not only to Mr. *Spicer*, who was the landlord granting the house, but to those who might become owners or occupiers, not only of this portion of the estate, but of any portion of the estate belonging to the Commissioners of the Exhibition of 1851. If it were necessary to go into that question as to how far this covenant was one intended not merely for the benefit of Mr. *Spicer*, but for the benefit of other owners of property bought by him or leased by him from the Commissioners, I should say the result would be in favour of the Plaintiff, but in my opinion that is not the question we have to consider here. That question would arise if the present Plaintiff was seeking to enforce against any other lessees or grantees from Mr. *Spicer* the contracts they had entered into with their lessor as regards the use of their houses. In my opinion the present question simply turns on what was the contract entered into by Mr. *Spicer* with the Plaintiff at the time when the Plaintiff contracted to buy from him this eighty years' term. In my opinion, therefore, the Plaintiff has a right to restrain Mr. *Spicer* from authorizing any of the houses to be used for purposes of trade. I say nothing about the other Defendants. Whether Mr. *Spicer* has done or threatened and intended to do anything which make it right to grant an injunction as against him, seems a doubtful point, but on the whole I think the Vice-Chancellor was right. [His Lordship then stated his reasons for holding that the Appellant had shewn his intention to use the rest of his property in a way inconsistent with the restrictive covenants.]

In my opinion, therefore, the judgment is right, subject only to this, that possibly the terms of the injunction may go too far. They go to restrain the Appellant from carrying on or permitting to be carried on on any part of the property the business of an hotel or any other trade or business. It was suggested that the word "permitting" would render him liable if one of his tenants who had entered into a covenant with him was not restrained by

him by action from using the property as an hotel. That, in my opinion, would not be the proper meaning of the injunction, and I think no Judge would think of committing the Appellant because without any active help from him one of his tenants violated the covenant, and he did not bring an action against him. I think, however, that it would be right to substitute the word "authorizing" for the words "permitting" and "suffering." The word "authorizing" would, in my opinion, clearly include assisting any attempt to do that which, in my opinion, the contract prevents the Appellant from doing as against Mr. *Martin*.

LINDLEY, L.J.:—

I am of the same opinion. It seems to me that this case really turns on the correspondence. In order to understand that correspondence and to give it its due effect, regard must be had to the circumstances which existed at the time. The material facts have been stated by the Lord Justice *Cotton*, and I am not going to repeat them. The circumstances to be borne in mind are the character of this property, the history of it, the sales by the Exhibition Commissioners, the covenants which they required Mr. *Spicer* to enter into, and the negotiations between him and Mr. *Martin*. Mr. *Martin* negotiated for the purchase of this house No. 2 for a term of eighty years, subject to a ground rent, and the price was a high one. The character of the neighbourhood was pretty well fixed by the covenants into which Mr. *Spicer* had entered. The character of the neighbourhood also depended, and would depend, very much upon the covenants which Mr. *Spicer* would require his lessees or the purchasers from him to enter into, and in the face of the letters of the 26th of February, 1874, and of September, 1880, it appears to me that it is impossible not to see that Mr. *Martin* at all events bought this house on the faith not only that the representation then made was true at the time it was made, but that it was intended as a continuing representation, in other words, as a representation not only that this property was then let in a particular way, but that it would continue to be let subject to the same restrictive covenants. I cannot read the correspondence in any other way. It certainly would be a surprise to any purchaser to be told, after he had bought his

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house on the faith of those letters, that his landlord was at liberty to alter the whole character of his letting. It appears to me that the case is governed by the proposition of law which is established by *Piggott* v. *Stratton* (1)—that if a man makes a representation that property is subject to covenants affecting it permanently, and he does so in order to induce a person to buy part of such property, and the person buys on the faith of such representation, the representation amounts to a contract by the vendor that he will not do anything to prevent the property from continuing what he has represented it to be. The Vice-Chancellor *Wood* laid that down in that case, and the mode in which he applied it was confirmed on appeal by Lord *Campbell* and by Lord Justice *Turner*. It is true that Lord Justice *Knight Bruce* in his judgment relied rather upon the terms of a particular covenant in the lease than upon the collateral contract, but he expressed no dissent from the view taken by the other learned Judges. It was urged there, as of course it always is urged in such cases, "Why did you not put the collateral contract into the lease?" No doubt it would be better to do so, but it does not follow that you cannot make a collateral contract at the same time that you make a lease, and in this case it appears to me that the correspondence which we have had read plainly makes a collateral contract, and I have no doubt that Mr. *Martin* is entitled to the relief which he asks.

With respect to the actual wording of the injunction, I do not suppose that the Vice-Chancellor meant that Mr. *Spicer* was to be compelled to take proceedings to stop his tenants or purchasers from doing that which they had no right to do. There may, however, be some little ambiguity about it, and I think it will be well to remove this ambiguity by substituting "authorizing" for "permitting" and for "suffering." In substance, however, the order made by the Vice-Chancellor was perfectly correct, and the Appellant must pay the costs.

LOPES, L.J.:—

This case really depends upon the construction of the letters which passed between the Plaintiff and the Defendant *Spicer*. In

(1) 1 D. F. & J. 33.

order to arrive at the true construction of those letters it is material to bear in mind what the state of things was when those letters passed. The Plaintiff was buying this house No. 2 for his private residence; he was giving a large sum of money for it with a substantial ground rent. It was situate in a neighbourhood fashionable and residential. All this was known both to the Plaintiff and the vendor. It was essential to the value of the house which the Plaintiff was buying that the adjoining houses should be used only as private residences and not be used for trade purposes. Mr. *Martin* knew that Mr. *Spicer*, his vendor, was under restrictive covenants with the Commissioners which prevented the property being used for trade purposes. Now it was in these circumstances that the letters in question passed between the Plaintiff and the Defendant *Spicer's* testator. I do not propose to read those letters, because they have already been read by Lord Justice *Cotton*. The question is, What is their true effect? Was there in those letters a representation amounting to a contract, that the Defendant *Spicer* would not during the term granted to the Plaintiff grant leases in any form other than in the form of the contract which had been sent by *Spicer* to the Plaintiff. I have carefully considered those letters, and I can only arrive at one conclusion. I think that there was a contract to the effect that I have mentioned, and that there was a collateral agreement—an enforceable agreement, entered into between the parties.

With regard to the other question in the case, I am clearly of opinion that *Spicer* was a party to what was done towards converting these houses into an hotel. I think, therefore, that the Vice-Chancellor was right on both points, and that this appeal ought to be dismissed with costs.

Solicitors: *Ashurst, Morris, Crisp, & Co.*; *Foster & Spicer.*

H. C. J.

C. A.
1886
CHITTY, J.
May 10.
C. A.
Oct. 26.

In re MYSORE REEFS GOLD MINING COMPANY.

Company—Winding-up—Remuneration of Liquidator—Companies Act, 1862, *ss.* 93, 161 [*Revised Ed. Statutes, vol. xiv., pp.* 223, 237]—*Regulation for Remuneration of Liquidator*, 1868—"*Divisible Assets*"—*Value of Shares.*

The regulation adopted by the Judges of the Court of Chancery in 1868 for fixing the remuneration of official liquidators is not binding upon the Judges, but is intended as a guide to them in exercising their discretion.

A limited company being in course of liquidation, a new company was formed, and a scheme was sanctioned by the Court, under which the new company took over the assets of the old company, and in consideration thereof agreed to pay its debts and to allot shares to the old shareholders instead of their old shares, each share to be of the nominal value of £1, with 15*s.* paid up and their market value was about 16*s.* *Chitty*, J., in fixing the scale of remuneration of the liquidator treated the value of the new shares allotted to the shareholders as assets of the old company of the value of 15*s.* each :—

Held by the Court of Appeal, that the Judge had acted on a right principle in having regard to the value of the new shares in fixing the scale of remuneration, and that they ought not to interfere with his discretion as to the value at which he estimated them.

"Divisible assets" in the regulation means assets free to be divided among the creditors and shareholders, not assets actually divided.

THE question in this case relates to the amount of remuneration payable to the official liquidator in the winding-up of the *Mysore Reefs Gold Mining Company* (*Limited*), which was being wound up by the Court.

A new company, called *The Mysore Reefs Gold Mining Company*, 1885 (*Limited*), was formed in order to take over the assets and carry on the business of the old company, under the 161st section of the *Companies Act*, 1862. By an agreement dated the 18th of November, 1885, made between the official liquidator and an agent for the new company, and sanctioned by the Judge on the 8th of December, 1885, the new company undertook to issue to the shareholders of the old company, on their applying for the same, a £1 share credited with 15*s.* as paid up thereon for each £1 share fully paid up held by them in the old company, and to pay and discharge all the debts of the old company and the costs, charges, and expenses of the winding-up thereof.

The debts of the old company and the costs and expenses of the winding-up were estimated to amount to between £6000 and £7000. The new company in pursuance of the agreement offered shares to the shareholders of the old company credited with 15*s.* on each share, and 85,000 shares were thus allotted.

At the date of the agreement the value of the shares in the old company was 1*s.* 6*d.* each. The new shares credited with 15*s.* paid up, and on which a further 1*s.* had been afterwards paid, were quoted and dealt with at 16*s.*

Under these circumstances, a question was raised before Mr. Justice *Chitty* as to the amount of remuneration of the official liquidator of the old company, having regard to the regulation of 1868 adopted by the Master of the Rolls and the Vice-Chancellors, and sanctioned and approved of by the Lord Chancellor (1).

The official liquidator claimed remuneration under group C, class 6, on the ground that the payment by the new company of the debts and costs and expenses of liquidation of the old company and the allotment to the shareholders of 85,000 shares credited with 15*s.* a share as paid up, especially having regard to their realizable value, as equivalent to the payment by the new company of a sum exceeding £70,000 as the price for which

(1) This Regulation is printed in Law Rep. 3 Ch. lxiv., and in *Buckley's* Companies Acts, 4th ed., p. 240 :—

The Regulation, so far as it affected the present case, provided as follows:—

"In fixing the amount of the remuneration the judge will, subject as hereinafter mentioned, be guided by the following scale—

LIQUIDATORS.

		Per day of 8 hours.
Group A, class 1. Where the assets divisible among the unsecured creditors shall not amount to . . .	£500	£1
Group B, class 4. Where they shall amount to	£5000 and not to £10,000	£4
Group C, class 6. Where they shall amount to	£50,000 and not to £100,000	£8

If in the special circumstances of any liquidation it shall at any time, or from time to time, appear to the Judge that it is proper to place it on a higher or lower class, he will so place it accordingly."

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the property of the old company was sold. On the other hand, the new company contended that the new shares did not form part of the assets of the old company, and that the liquidator's remuneration ought to be according to group B, class 4.

A summons having been taken out in Chambers, the Judge fixed the remuneration in accordance with the claim of the official liquidator, and the new company now moved to discharge that order and to fix the remuneration according to group B, class 4.

The summons was heard before Mr. Justice *Chitty* on the 10th of May, 1886.

Ince, Q.C., and *Grosvenor Woods*, for the new company.

Macnaghten, Q.C., and *H. B. Buckley*, for the official liquidator.

CHITTY, J. :—

The question raised on this motion is with reference to the remuneration to be paid to an official liquidator. The 93rd section of the Act of Parliament says: "There shall be paid to the official liquidator such salary or remuneration, by way of percentage or otherwise, as the Court may direct." There are no general orders on the subject, but a difficulty having taken place with regard to the mode and scale of remuneration, the Master of the Rolls—then Sir *John Romilly*—and the Vice-Chancellors adopted some regulations, which are stated in Mr. *Buckley's* book on Joint Stock Companies, for the purpose of guiding them in the exercise of their statutory discretion, and those regulations were sanctioned and approved by the Lord Chancellor. The argument that I heard against the order made in Chambers was perpetually gliding from these regulations, which are to be a guide to the Judge in exercising his discretion, into a reference to general orders, orders that are binding upon the Court. Of course, directly counsel's attention was called, as it had to be several times, to the mode in which these regulations are framed and the manner in which they are expressed, the argument was dropped.

Now these regulations are very useful, and are acted upon, speaking for myself, constantly, and adopted as the guide by which the wide discretion that is entrusted to me by the 93rd

section of the *Companies Act* is exercised. The regulations do this, they give a larger or less amount for the day of eight hours, according to the amount of the assets divisible. Where the assets, for instance, divisible amongst the unsecured creditors shall not amount to £500, then under the first class £1 is allowed for a day of eight hours. But to pass to a much higher class, group C, class 6, when the assets divisible among the unsecured creditors run between £50,000 and £100,000, then for a day of eight hours £8 is allowed. This, of course, is but a rough mode of estimating the remuneration of the liquidators, but on consideration the learned Master of the Rolls and the Vice-Chancellors thought that this was as good a way of getting rid of what would have been a practical and almost daily difficulty arising in their Chambers as could be arrived at; a small estate ought to pay a smaller sum, a large estate a larger sum. The regulations, as I have said, on the very face of them, are only a guide. There are clauses, which I need not read, to the effect that where there are special circumstances regard should be had to the special circumstances, and the amount to be paid to the liquidator might be raised or lowered. I not infrequently have applications by liquidators to alter the scale, and speaking for myself, I rarely accede to them; not the less so because they are generally cases in which the liquidator says, having regard to the work done, the scale of remuneration is not sufficient; whereas in the contrary case, where the scale has been ample he never comes and offers to reduce the amount. The answer is as a general rule, "You take those things for better, for worse."

Mr. *Hawkins*, the Chief Clerk to whom this matter is attached, reported to me that in practice assets divided among the shareholders as a return upon shares have been treated as assets divisible among unsecured creditors. Mr. *Hawkins* has been a Chief Clerk since 1864 down to the present time. He is an officer, therefore, who has been under Sir *John Romilly* and the late Master of the Rolls, as well as myself. He made a note about which I have spoken to him, and I have learnt from him that before he made this note he was anxious to discover what had been done in other branches of my Chambers, and he saw another of my Chief Clerks, nearly as experienced as himself,

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who was appointed in 1865. This was a joint note of those two Chief Clerks, the other Clerk being away through illness at the time. That practice, if I were acting upon the regulation as an order, appears to me to be perfectly right, because the language of the regulation is, where the assets are divisible, that is available for division, and not where the assets are divided, that is, distributed among the creditors, amounting to such and such a sum, a particular scale shall apply. I am satisfied, therefore, that that is the practice, and I am satisfied that there is no error in it at all, and that it is quite right. Where the assets amount to £50,000 and less than £100,000 it is quite immaterial so far as the work of the liquidation is concerned whether only £5000 of that goes to the creditors or £50,000; it is all available for division, and the division among the contributories may be more difficult, and may involve more time and labour than the division among the creditors. In these cases very often equities arise between the contributories; one has paid so much less and another so much more. There is a good reason, therefore, for saying that the regulation should be read as relating to the divisible estate.

Now in the case before me, what has been done is this; instead of selling the assets the 161st section has been brought into operation, under which the liquidator may, with the sanction of a special resolution, sell the assets of the company to another company, and, generally speaking, it is a new company, on the terms not merely of cash but on the terms of dealing with the shares. The shares are, under the agreement that I have before me, available by the contributories or shareholders on these terms, to put it generally: for every pound they hold in the old company they are to be credited with 15*s.*; that is to say, the thing sold to this new company as an asset is taken to be worth three-quarters of what it was. The number of the shares is, I think, 85,000, and on an agreed statement of facts which was before me in Chambers, as it is before me now, it was stated that it might be assumed for the present purpose that in response to application for these new shares, the new company allotted 85,000 shares, with 15*s.* paid on each share. The result, therefore, was, that by virtue of that agreement the new company were really the

purchasers of the value of the assets of the company, but the old shareholders who go into that concern undertake a liability of 5*s.* in the pound more than the 15*s.* they were valued at; thus you get the £1 shares. This agreement has worked well. The shares have been or are to be taken for the purposes of my decision as having been allotted. Then I get three-quarters of 85,000, and the shares, when the 1*s.* was paid which had to be paid on allotment of the new shares, were worth in the market 16*s.* So that the shares are brought up to this, that the 15*s.* is not to be considered to be a nominal sum, but to be the true value, the market value, of the new shares thus issued.

The result then is, that it is a sale of the assets to the new company for a sum exceeding £50,000. The amount is an amount which is divisible among the creditors, but not required to be divided amongst the creditors because the debts do not amount to that sum, and it is the machinery of the 161st section under which the liquidator acts. That enables him, instead of getting so much money for the assets of the company which he sells, to get the money's worth in the shape of shares, and instead of distributing the sale moneys in his hands from an actual sale, he, through the medium of the 161st section, is enabled to deal with the shares. It is immaterial whether application has to be made to him or to the new company for the shares, or whether they are allotted at his request or not; the result being that there is a sale of the assets for more than £50,000. I have not heard any reason why this liquidator should not be allowed to stand in that position of the scale which those facts bring him into. I am glad the question has been raised. I always look anxiously at the question of remuneration of liquidators. I should myself never exercise my discretion so as to make these liquidations more profitable than they are generally believed to be to a liquidator. At the same time, this is the scale which is held out; I do not say it is binding—I say it is to be taken subject to the discretion of the Judge in each particular case; and exercising my discretion carefully in the present case, after listening to the elaborate and skilful arguments of counsel, I come to the conclusion that I shall exercise my discretion well by affirming the order proposed to be made in Chambers.

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The result, therefore, is that the application must be refused with costs.

From this order the new company appealed. The appeal was heard on the 26th of October, 1886.

Ince, Q.C., and *Grosvenor Woods*, for the Appellants:—

The agreement between the liquidator and the new company was a scheme for the resuscitation of the company whereby the old shareholders were to retain their shares on their agreeing to be liable for a further sum of 5*s.* per share. The shares in the new company were in no sense assets of the old company divisible among the creditors of the old company. The creditors could not get at them by any process: *In re City and County Investment Company* (1). The only assets divisible among the creditors was the money paid by the new company in payment of the debts and expenses of liquidation, and that is the only amount on which the percentage ought to be calculated. The fact that the value of the shares has risen in the market so that the new shares are worth more than the old cannot be taken into account: *In re Agra and Masterman's Bank* (2). It is true that the Judge has power to take a higher scale if there are special circumstances; but there are no special circumstances here, and Mr. Justice *Chitty* did not treat it as a case depending on special circumstances, but decided it upon an erroneous application of the scale.

Macnaghten, Q.C., and *H. B. Buckley*, for the official liquidator, were not called on.

Cotton, L.J.:—

This is an appeal from an order of Mr. Justice *Chitty* which he made in a matter in which he had a discretion, although no doubt it was a discretion which is subject to appeal. He has fixed the remuneration of the official liquidator as coming under Group C, Class 6, of the Regulation of 1868. It is desirable to consider what is the force of that regulation. It is not a General

(1) 13 Ch. D. 475. (2) Law Rep. 7 Eq. 102.

Order, binding on the Judges by force of an Act of Parliament or otherwise, but it was intended to be a guide to the Judges in the exercise of their discretion in fixing the remuneration of liquidators. That appears from the introductory words of the regulation: "In fixing the amount of the remuneration the Judge will, subject as hereinafter mentioned, be guided by the following scale;" and at the end of the scale there is this reservation: "If in the special circumstances of any liquidation it shall at any time, or from time to time, appear to the Judge that it is proper to place it on a higher or lower class, he will so place it accordingly." This shews that the regulation was only to serve as a general rule for the guidance of Judges. I think a Judge would be rash if he departed from the scale fixed by this regulation, but still he has a judicial discretion to do so.

The first question we have to decide in this case is the meaning of the words, "Where the assets divisible among the unsecured creditors shall amount to," &c. Clearly that does not mean where the assets divided among the creditors amount to such and such a sum; it means assets not mortgaged and free to be dealt with either in payment of unsecured creditors or in distribution among the shareholders. The case before us is not strictly within either of the classes mentioned in the scale; because the assets of the company have not been realized in the ordinary way and divided between the creditors and the shareholders, but have been taken by a new company which agreed to pay the debts of the old company and to give to each of the old shareholders a £1 share with 15*s.* credited to him as paid up. This was not strictly within the words of the regulation, but I think that it comes within the analogy of it. It is not for us to say whether we should have taken the full value of the shares which were allotted as the amount divisible, which was the view that the Judge took, but the question is whether he ought to have entirely disregarded the value of the shares in estimating the amount. I am of opinion that Mr. Justice *Chitty* acted on a right principle in holding that by analogy to the regulation he ought to have regard to the value of the shares allotted to the shareholders. If the value had been received by the liquidator and divided by him among the shareholders, that amount would have come

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within the regulation; and I think that when the shares were taken by the shareholders, who wish to take advantage of the offer made by the new company, their value ought in the same way to be taken into account in determining the remuneration. The appeal must be dismissed.

BOWEN, L.J.:—

I entirely agree.

FRY, L.J.:—

I also agree.

Solicitors for the new company: *Snell, Son, & Greenip.*
Solicitor for the official liquidator: *H. Montagu.*

M. W.

C. A. 1886 *Nov.* 6.

In re COULTON. HAMLING *v.* ELLIOTT.

[1886 C. 743.]

Practice—Notice of Motion—Notice for a Day not in the Sittings.

A notice of motion was given for a day not in the sittings of the Court:—

Held, that the notice was good.

Daubney v. *Shuttleworth* (1) overruled on this point.

IN this case an originating summons was taken out by *H. Hamling* and his wife, the latter being a legatee under the will of *W. Coulton*, claiming a sum of money in the hands of the executors, and an order was made for payment of the money into Court.

On the 12th of April, 1886, an order was made by Mr. Justice *Pearson* in Chambers, in the presence of the Plaintiffs and Defendants and the mortgagees of the legacy, directing the money to be paid out of Court to the Plaintiffs.

On the 22nd of April the mortgagees gave notice of appeal

(1) 1 Ex. D. 53.

against the order "on the expiration of four days from the date of this notice or as soon after as counsel can be heard."

The day for which notice was given fell in the Easter Vacation when the Courts were not sitting.

On the appeal coming on to be heard,

Cozens-Hardy, Q.C., and *Malleson*, for the Plaintiffs, took the preliminary objection that the notice was given for a day not in the sittings, and was therefore void.

[They cited *Daubney* v. *Shuttleworth* (1); *Maullin* v. *Rogers* (2).]

Latham, for the Appellants:—

Daubney v. *Shuttleworth* has not been followed in practice. If the notice is bad, it can be now amended: *Williams* v. *De Boinville* (3).

Begg, for the Defendants.

COTTON, L.J.:—

There is no force in the objection: it must be overruled.

BOWEN and FRY, L.JJ., concurred.

A further objection having been taken that the Plaintiff *H. Hamling* had become bankrupt, the appeal was ordered to stand over.

Solicitors: *Freshfields & Williams; Wadeson & Malleson; J. E. Fox & Co.*

(1) 1 Ex. D. 53. (2) W. N. 1886, p. 104.
(3) 17 Q. B. D. 180.

M. W.

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Nov. 4, 5, 9.

In re MILLS' ESTATE.
Ex parte COMMISSIONERS OF WORKS AND PUBLIC BUILDINGS.

Lands Clauses Consolidation Act, 1845 [*Revised Ed. Statutes, vol. ix., p.* 628]—*Incorporation with Special Acts—Compulsory Purchase—Payment out of Purchase-money — Costs—Jurisdiction—Rules of Supreme Court*, 1883, *Order* LXV., *r.* 1.

Commissioners were incorporated by 3 & 4 Vict. c. 87 (1840), for the purpose of taking lands and carrying out thereon certain public works, and by 9 & 10 Vict. c. 34 (1846), powers to construct a new street were conferred upon such Commissioners, and it was enacted that all and singular the enactments and provisions of the Act of 1840 should extend to the new improvements as if they had been authorized by the former Act.

Neither of these Acts contained any provision for payment by the Commissioners of the costs of applications for payment out of purchase-moneys in Court in respect of lands taken under the powers of the Acts.

On petition for payment out of Court of purchase-money of lands taken by the Commissioners:—

Held, 1. (following *In re Cherry's Settled Estates* (1)), that the *Lands Clauses Consolidation Act*, 1845, could not be treated as incorporated with the Special Acts (3 & 4 Vict. c. 87, and 9 & 10 Vict. c. 34), so as to make the Commissioners liable to pay the costs of the petition for payment out.

Dictum of Lord *Esher*, M.R., in *In re Wood's Estate* (2) disapproved.

2. The *Judicature Acts* and Rules of Supreme Court, 1883, Order LXV., rule 1, do not enable the Court or a Judge to order costs to be paid by persons who before the Acts came into operation could not have been ordered to pay them: the effect and intention of the Acts and Orders being not to give any new jurisdiction to award costs, but only to regulate the mode in which costs are to be dealt with in cases where the Court antecedently had jurisdiction, either original or statutory, to award costs.

Foster v. *Great Western Railway Company* (3) followed.

Ex parte Mercers' Company (4) questioned.

APPEAL by the Commissioners of Works and Public Buildings from an order of Vice-Chancellor *Bacon*, so far as it directed payment by the Appellants of the costs of a petition for payment out of Court of the purchase-money of land taken by the Commissioners under 3 & 4 Vict. c. 87, and 9 & 10 Vict. c. 34.

By 3 & 4 Vict. c. 87, the Commissioners of Woods and Forests

(1) 4 D. F. & J. 332.
(2) 31 Ch. D. 607, 617, 618.
(3) 8 Q. B. D. 515.
(4) 10 Ch. D. 481.

were constituted a corporation for the purposes of the Act, were empowered to make additional thoroughfares in the metropolis, and for that purpose to take and purchase houses as therein provided (ss. 5, 21, 28).

Sect. 44 provided for payment into the *Bank of England*, in the name of the Attorney-General of the Court of Exchequer, of purchase-money, amounting to or exceeding £200, of hereditaments belonging to persons under disability, and for the application of the money under the direction of the Court, by an order made upon petition, in the purchase or redemption of land tax, or in the discharge of incumbrances affecting the hereditaments sold; or when not so applied, that the money should be laid out or invested under the direction of the Court in the purchase of other hereditaments to be settled to the same uses as the hereditaments sold.

There was no provision in the Act for the payment out of the purchase-money to persons absolutely entitled to the hereditaments taken.

Sect. 49 provided that where, by reason of any disability or incapacity of persons entitled to any hereditaments taken under the Act, purchase-money was paid into Court:—"It shall be lawful for the said Court to order the expenses of all purchases from time to time to be made in pursuance of this Act, or so made of such expense, as the said Court shall deem reasonable, to be paid by the said Commissioners, who shall from time to time pay such sum or sums of money, out of the moneys applicable to the purposes of this Act, as the said Court shall direct."

The Act contained no other provision as to costs.

By 9 & 10 Vict. c. 34, the Commissioners were empowered to construct a new street from *Spitalfields* to *Shoreditch*, and it was enacted (sect. 18), that for the purpose of constructing such new street the Commissioners were to have the powers given by 3 & 4 Vict. c. 87, and that all and singular the enactments and provisions in such Act contained should extend to and be construed in all respects as if those provisions had been passed for the purpose of authorizing the laying down and construction of the new street by the subsequent Act authorized to be laid down, and

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for the purchase and taking of hereditaments; except that with respect to any moneys payable into the *Bank of England* the same should be paid to the Accountant-General of the Court of Chancery, and that such moneys should be applied under the direction of the Court of Chancery in like manner as by the former Act they were directed to be applied under the direction of the Court of Exchequer.

The *Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 18), provides (sect. 1), "This Act shall apply to every undertaking authorized by any Act which shall hereafter be passed, and which shall authorize the purchase or taking of lands for such undertaking, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed, together therewith, as forming one Act."

In May, 1849, certain hereditaments belonging to the late *S. Mills* were required to be taken by the Commissioners. In August, 1851, the purchase-money, £1000, was paid into Court, and on the 30th of December the conveyance to the Commissioners was executed. On the 20th of April, 1852, the £1000 was ordered to be invested, and the income was paid to the tenant for life until his death.

On petition by the persons who had become absolutely entitled to the fund in Court upon the death of the tenant for life, Vice-Chancellor *Bacon* made an order for payment out of the fund to the Petitioners, and, without formal discussion of the point, directed Her Majesty's Commissioners of Public Works and Buildings to pay to the Petitioners their costs of and incident to the application out of any moneys which might be appropriated and placed at their disposal by Parliament for that purpose; such costs to be taxed by the Taxing Master.

From so much of this order as related to costs, the Commissioners of Her Majesty's Public Works now appealed.

Sir *R. Webster*, A.G., and *F. V. Hawkins*, in support of the appeal:—

The Vice-Chancellor had no jurisdiction to order the payment of costs by the Commissioners. The point was decided by him without argument on the authority, apparently, of *Ex parte Mercers' Company* (1), but we submit that that decision does not apply, or, if applicable, ought not to be followed. In the special Acts (3 & 4 Vict. c. 87, and 9 & 10 Vict. c. 34) under which the land was taken, there is no provision for payment by the Commissioners of the costs of applications for payment out of Court, so that, unless the provisions of the *Lands Clauses Act* are to be deemed to have been incorporated, the case is not one in which, apart from the question under the *Judicature Acts* and Rules of Court, the Commissioners would be liable to pay the costs of the application. But *In re Cherry's Settled Estates* (2) is an express decision *in pari materiâ*, by Lord Chancellor *Westbury* sitting on appeal, that the *Lands Clauses Act* has not been incorporated with 3 & 4 Vict. c. 87, and 9 & 10 Vict. c. 34; and the authority of that decision has not, we submit, been in any way affected by Lord *Westbury's* subsequent decision in *In re Westminster Estate of the parish of St. Sepulchre* (3), where the special Acts were both subsequent to the *Lands Clauses Consolidation Act*, nor by the adverse comments of the present Master of the Rolls in *In re Wood's Estate* (4), which were merely *obiter dicta*.

If, then, before the *Judicature Acts* the Commissioners would not have been liable to pay these costs, has the Court jurisdiction under the combined effect of the *Judicature Acts* and the Rules of the Supreme Court, 1883, Order LXV., rule 1, to give costs in cases where it could not formerly have given them? Notwithstanding *Ex parte Mercers' Company*, followed in *In re Lee and Hemingway* (5), a doubt has been expressed whether the Act and Orders mean more than this, that where the Court can give costs they shall be in the discretion of the Court: *In re Knight's Will* (6); and we submit upon the authorities that the Acts and Rules do not give jurisdiction to order payment of

(1) 10 Ch. D. 481.
(2) 4 D. F. & J. 332.
(3) 4 D. J. & S. 232.
(4) 31 Ch. D. 607.
(5) 24 Ch. D. 669.
(6) 26 Ch. D. p. 91, per *Cotton*, L.J.

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costs in cases where the Court before the Act had no jurisdiction to do so: *Foster* v. *Great Western Railway Company* (1); *Dicks* v. *Yates* (2); *In re Bradford* (3). In this case the Commissioners, who have paid the purchase-money into Court, are not parties against whom, apart from the special Acts, the Court has any jurisdiction to award costs adversely: *In re Primrose* (4); *In re Charity Schools of St. Dunstan in the West* (5); *In re Knight's Will* (6).

H. B. Buckley, for the Respondents:—

The decision in *In re Cherry's Settled Estates* (7) has been expressly disapproved by Lord *Esher* in *In re Wood's Estate* (8).

[Cotton, L.J.:—After Lord *Westbury's* decision in *In re Cherry's Settled Estates*, unless you can distinguish the present case from it, we cannot allow the question whether the *Lands Clauses Consolidation Act* was incorporated with 3 & 4 Vict. c. 87, and 9 & 10 Vict. c. 34 (the Acts under which the Commissioners exercised their powers) to be argued.]

Even if the Court had no jurisdiction before the *Judicature Acts* to order the Commissioners to pay these costs, the words of Order lxv., rule 1, are sufficient to give jurisdiction now. The effect of the *Judicature Acts*, 1873 (ss. 68, 69) and 1875 (ss. 17, 24, and 33), was to give the Judges power to make rules having statutable force, and dealing with any principle of law which affected rules of procedure and practice: *Snelling* v. *Pulling* (9). Under that power Order lxv., rule 1, which is an extension of Order lv. (of 1875), was made; and the combined effect of the Acts and of this rule has been to repeal all previous enactments as to costs: *Garnett* v. *Bradley* (10); *Ex parte Mercers' Company* (11); and to give the Court absolute discretion as to the costs "of and incident to all proceedings in the Supreme Court."

[Fry, L.J.:—Do those words mean all proceedings in the High

(1) 8 Q. B. D. 515.
(2) 18 Ch. D. 76.
(3) 15 Q. B. D. 635.
(4) 23 Beav. 590.
(5) Law Rep. 12 Eq. 537.
(6) 26 Ch. D. 82.
(7) 4 D. F. & J. 332.
(8) 31 Ch. D. 607.
(9) 29 Ch. D. 85.
(10) 3 App. Cas. 944.
(11) 10 Ch. D. 481.

Court of every kind, or are they limited to proceedings in which there is an existing jurisdiction as to costs ?]

That point did not directly arise in *Garnett* v. *Bradley* (1), but it has been distinctly decided that that discretion extends to directing payment of costs in cases where any Acts, public or private, have omitted to make any express provision as to the costs of proceedings thereunder: *Ex parte Hospital of St. Katharine's* (2); *Ex parte Mercers' Company* (3); *In re Lee and Hemingway* (4); *In re Carthew* (5); and accordingly the Court has jurisdiction to order the Commissioners to pay these costs There is nothing in *Witt* v. *Corcoran* (6), *Dicks* v. *Yates* (7), and *Foster* v. *Great Western Railway Company* (8) to affect the general rule. Those cases are distinguishable from the present case on the ground that it was a well-established rule of the Court of Chancery that when a plaintiff has altogether failed, as he did in those cases, the defendant could not be ordered to pay any costs of the action: the only qualification to Order LXV. being, as is shewn by the above cases, that the discretion to give costs does not extend to cases in which the Court was absolutely precluded from so doing by the principles and rules on which it has always hitherto acted. The Court will lean to the construction contended for, because in cases where powers of taking land compulsorily are given it is impossible to attribute to the Legislature an intention that the persons whose land is so taken should have to pay the costs of any application to the Court thereby rendered necessary.

F. V. Hawkins, in reply:—

By the *Judicature Act*, 1873, s. 23, the jurisdiction transferred to the High Court is to be exercised as to procedure and practice in the manner provided by the Act or the Rules made pursuant thereto, and when no special provision is therein contained, as it might have been by the Courts from which the jurisdiction was transferred. The function of the Rules is not to confer jurisdiction (at all events not to do so indirectly), but to determine the

(1) 3 App. Cas. 944.
(2) 17 Ch. D. 378.
(3) 10 Ch. D. 481.
(4) 24 Ch. D. 669.
(5) 27 Ch. D. 485.
(6) 2 Ch. D. 69.
(7) 18 Ch. D. 76.
(8) 8 Q. B. D. 515.

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mode in which jurisdiction is to be exercised. So that when a rule states that costs are to be within the discretion of the Court, it must mean such costs as are already within the jurisdiction of the Court. And if the Court should direct these costs to be paid by the Commissioners it would, in fact, be declaring that costs were payable out of a special fund which by Act of Parliament has been made applicable to other purposes.

1886. Nov. 9. COTTON, L.J. :—

The first question which we have to consider is whether we are to treat the *Lands Clauses Consolidation Act* as incorporated into the Acts 3 & 4 Vict. c. 87 and 9 & 10 Vict. c. 34, under which the Commissioners are acting. Now, of course it cannot be suggested that the *Lands Clauses Act* was incorporated into or applied to the exercise of the powers contained in the earlier Act, which was passed in 1840. The *Lands Clauses Act* was passed in 1845, but 9 & 10 Vict. c. 34, in July, 1846. Now, in my opinion, that point is already settled for us. We have the decision in *In re Cherry's Settled Estates* (1), in the very case where the Commissioners were acting under the same Acts of Parliament as here ; and there Lord *Westbury*, sitting as the Court of Appeal in Chancery, decided that the *Lands Clauses Act* was not to be considered as incorporated with the later Act (9 & 10 Vict. c. 34) : that is to say, it did not apply to the exercise of the powers given by that Act, and, accordingly, that the Commissioners could not be ordered to pay the costs of an application similar to the present one. I should hardly mention more than that decision, except that in *In re Wood's Estate* (2) the present Master of the Rolls, sitting in the other branch of this Court, though he was deciding a question arising on a different Act (18 & 19 Vict. c. 95), which gave powers to these Commissioners, expressed an opinion that that decision was erroneous, and one that he did not follow, and that in future it ought to be set aside and disregarded. Of course that was only an *obiter dictum*. It was not a matter which had to be decided in the case before him, but I do not agree with the view he took. I think it would be wrong for us to disregard the

(1) 4 D. F. & J. 332. (2) 31 Ch. D. 607.

decision in *In re Cherry's Settled Estates* (1), and I must express my opinion that I think it was rightly decided, because 9 & 10 Vict. c. 34, although it was subsequent to the *Lands Clauses Consolidation Act*, threw the Commissioners, in taking any land after that, back to the 3 & 4 Vict. c. 87, which clearly could not and did not incorporate the *Lands Clauses Act*. It seems to me that there is a distinction, not so fine that it cannot be appreciated but a clear distinction, in this case, namely that although the later Act was passed to enable the Commissioners to take the land which they have taken in this case, there was a provision in that Act of Parliament which requires us to deal with the exercise of those powers, and with the funds which they had to raise under the later Act, just as if the provisions of 9 & 10 Vict. c. 34 had been part of and incorporated with the earlier Act, so that their powers are to be considered as exercised under the earlier Act and not under the later. That, then, decides this point. Of course, if the *Lands Clauses Consolidation Act* had been incorporated, there would be no question that the Vice-Chancellor's order was right.

As this is so, there is no doubt that up to the time of the passing of the *Judicature Acts* no order could have been made against the Commissioners requiring them to pay the costs of the application for getting the money out of Court. Then we have to consider what is the effect of the *Judicature Acts* and of the rules under those Acts. Now the rule which was relied upon is what was Order LV., r. 1, of the earlier Orders, now Order LXV., r. 1; the terms, so far as they are applicable to the present question, being exactly the same. The question is, whether the words of this rule, "subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court—shall be in the discretion of the Court or Judge," enable the Court or Judge to order costs as against persons who, up to the time when the *Judicature Acts* were passed and the Orders came into operation, were not liable to be ordered to pay these costs. Of course, one must mention at the very first that the late Master of the Rolls in *Ex parte Mercers' Company* (2), decided, or expressed his opinion—for it does not quite appear how the

(1) 4 D. F. & J. 332. (2) 10 Ch. D. 481.

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matter arose in the particular case—that the effect of the *Judicature Acts* and of that Order was to enable the Court, where it previously had no power so to do, to order respondents, in the position of the present Appellants, to pay costs, although the Act under which they were dealing did not give power to the Court so to do. That has been followed in several cases, and I understand it was on the ground that that case was decisive of the present question, that the point was not really argued in the Court below, counsel on both sides agreeing that they could not ask the Vice-Chancellor to act otherwise than in accordance with that decision. But it is extraordinary that the point which we have now to consider, and which was the matter of appeal here, and on which the view of the late Master of the Rolls in *Ex parte Mercers' Company* (1) has been followed, not only in this but in other cases, does not seem really to have been argued before the late Master of the Rolls. The parties in the position of the present Appellants, the Commissioners of Sewers, there wished to make out that the *Judicature Acts* and Orders did give the Judge power to refer the question of taxation to the Taxing Master, there having been an agreement between the parties, upon which, as giving him more costs than he would otherwise get, the landowner was insisting. That fact, to my mind, detracts a good deal from the weight of the decision. But I also find that the late Master of the Rolls begins his judgment by saying (2): "It appears to me that the question has practically been decided by the House of Lords in a recent case of *Garnett* v. *Bradley* (3)." In my opinion that case, to which I shall afterwards have to refer, does not govern the present case, and therefore there again I think the late Master of the Rolls was in error as regards the view which he there took. We must consider whether that decision in *Ex parte Mercers' Company* is right and is to be followed or not on this occasion. Referring again to Order LXV., r. 1, I do not in any way enter into the question as to the authority to make such an order, but Order LV. of the Rules of the Supreme Court of 1875, which in this respect it follows, is to be considered as if it had been part of the *Judicature Act*, 1875, to which it was scheduled;

(1) 10 Ch. D. 481. (2) 10 Ch. D. 482.
(3) 3 App. Cas. 944.

and, to my mind, the question is what, having regard to the purport and object of the Rules and Orders made under the *Judicature Act*, is to be considered the true construction and effect of these words: "Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the Court or Judge." What was the object of these Rules and Orders? Was it to give to the Court a jurisdiction, which did not previously exist, or was it not rather to regulate the manner in which the jurisdiction given to the Court, and which the Court had independently of this rule, was to be exercised?

Sect. 23 of the *Judicature Act*, 1873, which has a bearing on this point, provides that "The jurisdiction by this Act transferred to the said High Court of Justice, and the said Court of Appeal respectively, shall be exercised (so far as regards procedure and practice) in the manner provided by this Act or by such Rules and Orders of Court as may be made pursuant to this Act; and where no special provision is contained in this Act or in any such Rules and Orders of Court with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective Courts from which such jurisdiction shall have been transferred, or by any of such Courts." Now the object of the Acts was not to give new jurisdiction; but the jurisdiction previously exercised by certain of the Courts was transferred to the High Court constituted by the Acts, and the object was to enable the High Court to deal not only with questions of one branch of law, but with all questions—so as to administer both Common Law and Equity—and not to render it necessary to send suitors from one tribunal to another, or compel defendants to seek the aid of Chancery when a Common Law right was being insisted upon contrary to equity. In my opinion, having regard to that and to the object here expressed, which was to be provided for by Rules and Orders, the true construction of this order is that it was only intended to regulate the way in which costs were to be dealt with when power was given to the Court, or, independently of Act of Parliament, the Court had power to deal with costs. That, to my mind, seems to be, even if there was nothing else in the case, or no decision which in any way could

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guide us, the true meaning, construction and effect of this particular order. And we must remember this—and it was a matter remarked upon by Lord *Blackburn* in *Garnett* v. *Bradley* (1)—that to hold the contrary here would be really to alter the rights of individuals as existing under special Acts of Parliament. If in this case the Commissioners, taking land without any express provision as to their payment of the costs of applications to the Court for payment of money out, are to be held liable to pay the costs, a greater burden will be thrown upon them than was thrown upon them when Parliament gave them the powers in exercise of which they have taken the land. If it is to apply against them, it must also apply against the landowners; and that would be giving the Court discretion to deprive of costs a landowner to whom, when power was given to take his land, this special benefit, that he should have the costs, was reserved by the *Lands Clauses Consolidation Act*; and although of course under some Acts there is the power to deal with the costs by giving them to the landowner, yet all that in my opinion is not sufficient reason for holding, though we have not now to decide it, that this order gave the power to deal with the costs, which, as provided by the *Lands Clauses Consolidation Act*, were given to the landowner, or where there is no such power, in consequence of that Act not applying, to charge the Commissioners who are taking the land, with costs.

That, in my opinion, if one had to consider this case entirely free from authority, would be the true construction of the *Judicature Acts* and Orders. But it is not untouched by authority. Of course we are bound when the matter comes before us to consider whether the view of the late Master of the Rolls, however much it has been followed by other Judges of first instance, was right or wrong. We must consider whether there has been any decision which binds us, contrary to the view which I have expressed, as to the true construction of the Order, and also whether there is any decision of this Court from which we cannot and ought not to depart. Now *Garnett* v. *Bradley* was thought by the late Master of the Rolls to be decisive of this case. Of course if that be so we must bow to that decision, as one of the

(1) 3 App. Cas. 944.

House of Lords, but in my opinion it in no way decides the point before us. In that case there were certain restrictions on the right of a plaintiff to costs imposed by the Act 21 Jac. 1, c. 16, then under consideration, under which he was not to receive in actions of libel more costs than the damages which he recovered. That put a restraint upon the Court as to the right of giving him costs, and, accordingly, the House of Lords held that this Order, which has the effect of an Act of Parliament, removes all fetters imposed upon the Court as to the *quantum* of costs to be given to a successful party, and the mode in which costs are to be given. That is entirely different. This provision repeals all provisions in previous Acts of Parliament which were inconsistent with it, which is a very different thing from saying that the words of this Order give to the Court jurisdiction, which it had not previously, to deal with costs and to make a suitor, or any one else who comes before the Court, liable to costs where there was no such power before. But, then, in my opinion, there are decisions of the Court of Appeal which support the view which I have expressed. The first that I refer to is *Dicks* v. *Yates* (1). In that case the plaintiff's action was dismissed, but the Vice-Chancellor ordered the defendant to pay the costs—not costs occasioned by some particular misconduct of the defendant, but the general costs of the action. An appeal by defendant from this order was allowed. It had been contended against the appeal that it was an appeal for costs only, and that costs being in the discretion of the Judge there could be no appeal. *Jessel*, M.R., in his judgment (2), says: "I think that this objection cannot prevail. The whole costs of the action are ordered to be paid by the defendant to the plaintiff. The defendant says that the plaintiff had no title whatever to sue him, and he appeals on that ground, asking that the action should be dismissed. Now, if a plaintiff has no title, are the costs of the action in the discretion of the Court, so that the Court can give the whole of them to the plaintiff? It seems to me that they are not." If the construction of Order LXV., rule 1, now contended for was right, the costs in *Dicks* v. *Yates* could have been ordered to be paid by the defendant, because all costs are in the discretion of the Court. But the Court of Appeal there

(1) 18 Ch. D. 76. (2) 18 Ch. D. 84.

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held, following previous decisions, that where a plaintiff is entirely wrong, and his action is dismissed, there is no power in the Court to make the defendant pay the costs of the plaintiff who has wrongfully brought him into Court. That, to my mind, is entirely inconsistent with the view that this Order, having the effect of an Act of Parliament, puts it in the power of the Court to order a person, not otherwise liable to pay costs, to pay them. I then refer to *Witt* v. *Corcoran* (1), an earlier case, but one which was referred to in *Dicks* v. *Yates* (2). There there was a motion to commit for contempt, and no committal, but the order directed the person alleged to have committed contempt to pay the costs. On the appeal it was objected that there could be no appeal, because the costs are in the discretion of the Judge, and no order for costs only in the discretion of the Judge would be open to appeal. The Court of Appeal entered into the question whether there had or had not been a contempt, because unless there had been a contempt there was no power in the Court to order the persons brought before it to pay the costs. If there was contempt then the costs were in the discretion of the Judge, and there could be no appeal. But unless there had been a contempt the costs could not be in the discretion of the Judge, and therefore the Court entered into the question whether in fact there had or had not been a contempt. We then come to *Foster* v. *Great Western Railway Company* (3), which is probably decisive of this case. That was a question under the powers given to the Railway Commissioners by the *Regulation of Railways Act*, 1873 (36 & 37 Vict. c. 48), which contained a proviso (s. 28), very like this Order—that the costs of and incidental to any proceedings before the Commissioners should be in the discretion of the Commissioners. The Commissioners having held that the person who brought before them the *Great Western Railway Company* was wrong, ordered the railway company to pay half the costs of the proceedings on the ground that the costs of any proceedings —that is to say of all proceedings—before the Commissioners were in their discretion. The Court said, No, that does not give them power to deal with costs in that way contrary to the principles on

(1) 2 Ch. D. 69. (2) 18 Ch. D. 76.
(3) 8 Q. B. D. 515.

which the Courts act. They refer to this particular clause in the Orders as analogous, and when they decided that that provision in the Act of Parliament gave the Commissioners no power to make a successful party pay costs, they decided in fact that this Order has not the general effect contended for by the Respondents here of giving power and jurisdiction to order a party, not otherwise liable to pay costs, to pay them. In my opinion therefore, not only on the true construction of this Act of Parliament and on the Orders, but on the decisions of this Court, we must hold that the order made was wrong, and that the Appellants are entitled to have that part of the order, which was not argued before the Vice-Chancellor, discharged.

BOWEN, L.J. :—

On the first question it seems to me that we are clearly governed by *In re Cherry's Settled Estates* (1), and I should say nothing more than that we were governed by that case if it was not that the present Master of the Rolls in the case of *In re Wood's Estate* (2) has expressed *obiter* an opinion about *In re Cherry's Settled Estates* with which I confess, I cannot agree, and has gone so far as to say that he thinks that case was decided upon lines too subtle for ordinary apprehension, and that it ought to be set aside, ought to be set by or disregarded, or relegated to oblivion. I only wish to say I do not agree with that. I think *In re Cherry's Settled Estates* was absolutely rightly decided on lines which I think are right lines of construction of these Acts; and if it had been decided any other way I should have thought the direction wrong. Therefore, the *Lands Clauses Consolidation Act* was not incorporated with these Acts.

Then we come to a more difficult and embarrassing point, because in all probability the principle we decide will apply to other cases. It is whether, assuming the *Lands Clauses Consolidation Act* not to have been incorporated, the Court nevertheless has, under Order LXV., rule 1, jurisdiction over these proceedings to give the costs of the proceedings in such a sense that it can deal with the costs as if they were the costs of an ordinary action, and inflict them on persons who, but for the *Judicature Acts*,

(1) 4 D. F. & J. 332. (2) 31 Ch. D. 607.

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would not be liable to pay them at all, and upon Commissioners who, but for the *Judicature Acts*, would not on the Acts under which they carry on their proceedings be liable to any such payment. That drives us to put a construction, for the purposes of this case, upon Order LXV., rule 1. What does the *Judicature Act* really mean when it says that "Subject to the provisions of the Acts, &c."? Does that override all previous laws about costs and start quite fresh on the subject, placing costs in each and every case in the discretion of the Court? And here we must distinguish between cases where the parties suing belong to the general body of litigants of the country and cases where one or other of the litigants is entitled to the special privilege of the statute. With regard to costs of general litigation, in the first place does this rule put within the discretion of the Court all such costs, or does it still leave excepted from the jurisdiction of the Court such costs as the Chancery Division in olden times before the *Judicature Acts* thought itself precluded from treating as subject to its power? With regard to this first class, the costs of general litigants, I confess I should have been inclined myself to think that the *Judicature Acts* and the Rules intended to make a new start, not to confine the Court, as the Court of Chancery had previously been confined, in any way, but to place all costs of and incident to general litigation, not in the narrowest but in the wider sense of those words, within the power of the Court. But then I do not think I am at liberty to exercise my own imagination upon this point, because it seems to me that *Foster* v. *Great Western Railway Company* (1) has decided exactly the opposite; and I certainly never would myself be a party to frittering away any decision which is based upon principle. In that case the Railway Commissioners, dealing between the *Great Western Railway Company* and the applicant, had inflicted upon the company (whose liability they held not to be established), in consequence of what they thought to be some previous arbitrary conduct, which yet did not affect the rights of the case, some portion of the costs of the litigation which terminated in establishing the railway company's position at law. That was sought to be justified on the ground that the

(1) 8 Q. B. D. 515.

Act of Parliament which constituted the railway tribunal, and which limited their functions, had stated in words—which, be it observed, are the very words to all intents and purposes of this rule, though the Railway Commissioners Act was passed long before it—that the costs should be in the discretion of the Commissioners. The Court of Appeal discussed Order LXV. of the Rules of the Supreme Court by way of illustration. Having discussed it, they came to the conclusion that if it was a question of construing Order LXV., rule 1, they would feel bound to put upon that rule the limitation that, notwithstanding its wide terms, costs were not placed within the discretion of the High Court of Judicature which the Court of Chancery had previously considered outside its jurisdiction, viz., the costs of a successful defendant. The High Court would have no power in such a case they thought to order a defendant who had been wrongly sued to pay the entire costs of the action of the person who had brought him before its tribunal without cause. In *Foster* v. *Great Western Railway Company* (1) the statute contained, as I have said, these wide words: "Costs shall be in the discretion of the Railway Commissioners." Nevertheless, the Court of Appeal,—reasoning by the analogy of Order LXV.,—said that these wide words did not include costs which the Court of Chancery could not previously have dealt with.

Now, I think that case governs us in two ways. In the first place, it was by considering what would be the true construction of Order LXV., rule 1, if that had been a question before them, that the Court proceeded to their ultimate conclusion as regards the construction of the Commissioners' Act, and incidentally they did put a construction upon Order LXV., rule 1, thinking it was necessary or useful for their purpose to do so. In that way the construction of Order LXV., rule 1, became a *ratio decidendi*. But further than that, even if it had not been so, I should have thought that the decisions which they arrived at in construing an Act dealing with the jurisdiction of one Court ought really to be followed *in pari materiâ*, in construing a statutory rule which deals with the discretion of another Court. To say that the law which is to be applied to the discretion with which the Railway

(1) 8 Q. B. D. 515.

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Commissioners are clothed under their statute, is not to apply to the discretion of the Judges of this Court, or of the High Court of Justice, would not only be to violate a homely English proverb, but would be contrary, I think, to reason. We must assume that what is good law for the one Court is good for the other. Therefore on the ground that *Foster* v. *Great Western Railway Company* (1) really does decide the question as to what is the effect of Order LXV., rule 1, upon the costs of general litigants, I, whatever my own view would otherwise have been, feel no hesitation in saying that *Ex parte Mercers' Company* (2) cannot be supported.

But when we come further to the question of costs of privileged persons, classes, or causes, as distinguished from the costs of general litigants—I mean by "privileged," persons, classes, or causes, who or which for the purpose of this question of costs are exempted from the general law either by Act of Parliament or otherwise—then it seems to me that *Garnett* v. *Bradley* (3) does not bind the Courts to say that the true effect of Order LXV., rule 1, is to repeal all the fetters placed upon the discretion of Judges by earlier Acts under which the privileges of such exempted classes, persons, or causes are preserved. Supposing for a moment that there is, as I daresay there is, some Act of Parliament which says that a particular railway company is in a particular litigation not to pay costs, is it intended by Order LXV., rule 1, to destroy that privilege? Take for a moment the case of some corporation created by statute—and many Government officials have been created corporations by statute for the purpose of litigation—supposing their statute says they are not to pay the costs, and that such statute preceded the *Judicature Act*, is it intended by Order LXV., rule 1, to destroy their privilege? It seems to me that *Garnett* v. *Bradley* has not decided that, and that one must wait until the House of Lords does decide it, or this Court of Appeal does decide it, to say that such is the law.

On these grounds, therefore, having regard to *Foster* v. *Great Western Railway Company*, which, I think, really governs the case; having regard to the fact also that *Garnett* v. *Bradley*, although

(1) 8 Q. B. D. 515. (2) 10 Ch. D. 481.
(3) 3 App. Cas. 944.

a case of wide extent, so far as its influence upon the action of the Courts is concerned, yet still is a case not without its limitation, it seems to me I ought to come to the conclusion that the Courts have no power to inflict upon the present Commissioners the cost of this proceeding, and that the appeal must be allowed.

FRY, L.J. :—

I am of the same opinion. It appears to me that the questions which have been discussed in this case are entirely covered by authority. Those questions are in substance two. The first is one of construction upon the statutes which are in controversy in this case, viz., whether the *Lands Clauses Consolidation Act* is or is not incorporated by the passing of the later of those statutes. On that point the case of *In re Cherry's Settled Estates* (1) is a direct authority. It appears to me that whether I did or did not follow the reasoning in that case, I should consider myself bound loyally to follow that decision. If it were not for the observations of the Master of the Rolls upon it, I should probably content myself with so following it. But having regard to what he has said, I think it right to say that in my judgment that case is not only perfectly comprehensible, but perfectly right, and I regard it in this case as a binding authority on me. Therefore I cannot agree with the view which he expressed that there never would be another case in which *In re Cherry's Settled Estates* would be an authority.

The second question arises on the construction of the 55th of the Orders contained in the first Schedule to the Act of 1875, which by sect. 16 of that Act are made operative. I state the question in that form, because it appears to me to be clear that we have nothing to do with the consideration of the later rules in this matter, inasmuch as the rule contained in the schedule to the Act of 1875 is, for the purpose of the present inquiry, in the same terms as the existing rule. So far as we have to discuss it, that rule has not been altered or amended under the power to alter and amend given by the 17th section of the *Judicature Act* of 1875, which again has been amended by subsequent statutes. Therefore we have no question to investigate with regard to the powers or

(1) 4 D. F. & J. 332.

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authorities of anybody making any amendment or alteration. The question, I therefore repeat, is a simple one of construction of that order contained in that schedule, to which effect is given by sect. 16 of the Act.

Now if the question were one free from decision, I think it would be one of great difficulty. I am not sure that the inclination of my mind is not in the direction of the observations made by Lord Justice *Bowen*, but I do not think it needful, or perhaps desirable, to express any opinion on the point which, it appears to me, is completely covered by the authority of this Court. The question appears to me to be simply this: are the words "all proceedings in the High Court" to be construed in the full extent of meaning which they seem to carry? Do they really mean all proceedings of every kind in the High Court; or are they to be restricted to mean all proceedings in the High Court in respect to which there is an existing jurisdiction as to costs? That is the question, and that question does not seem to me to have been determined in *Garnett* v. *Bradley* (1), because the order in that case was made in a matter in which there was an existing statutory jurisdiction as to costs. Therefore, as was fairly admitted, the precise point now for consideration did not arise there. But that precise point appears to me to have been the subject of judicial decision in the case of *Foster* v. *Great Western Railway Company* (2), where the question arose upon terms similar to those in Order LV., contained in the Act which constituted or empowered the Railway Commissioners.

Now the course of the decision of the Court in that case was this: they said that the section in the Railway Act was *in pari materiâ* with Order LV. in the schedule to the Act of 1875; and that the meaning of that rule was, that the Chancery and Common Law Divisions of the High Court should have the same power which the Court of Chancery had before. They said that the Court of Chancery before had not jurisdiction over the costs in all cases, but only in certain cases, and they therefore concluded that the Railway Commissioners had not jurisdiction in every possible case, but that the jurisdiction was confined to cases in respect to which, according to the existing law, there was jurisdiction as to

(1) 3 App. Cas. 944. (2) 8 Q. B. D. 515.

costs. That was a very clear course of decision; and therefore the proposition that Order LV. did not give jurisdiction as to costs in all possible cases was one of a series of propositions on which the conclusion in that case was made to depend by the Court of Appeal. It was said, and I have no doubt truly, by Mr. *Buckley*, that it was possible to arrive at that conclusion by another course of reasoning, and by another series of propositions. But that is not a real answer. When you are asking what has been decided, you must look at what the actual line of decision of the Court was; and if you find that a particular proposition comes in that line of decision, the statement of that proposition is not an *obiter dictum*, but is part of the decision of the Court. I think, therefore, that the point we have now to determine was decided in *Foster* v. *Great Western Railway Company* (1); that we are bound by that; and I bow to it without any expression of opinion as to whether I should have come to the same conclusion or not. I think therefore that the appeal must succeed.

Solicitors: *Hare & Co.; Hollams, Son, & Coward.*

F. G. A. W.

ROSS *v.* ARMY AND NAVY HOTEL COMPANY.

[1885 R. 2602.]

Company—Mortgage Debenture—"Covering Deed"—Bills of Sale Act (1878) *Amendment Act,* 1882 (45 *&* 46 *Vict. c.* 43), *s.* 17—*Registration.*

Debentures were issued by a company under its common seal with a condition annexed that the holders of debenture bonds of that issue were entitled *pari passu* "to the benefit of an indenture dated the 24th of November, 1883, whereby—subject to a sum of £ —— and interest secured on mortgage—the freehold buildings and premises of the company and all the machinery, fittings, fixtures, and furniture of the company in and about the said premises, and any other machinery, fittings, fixtures and furniture that may be substituted therefor during the continuance of the security effected by the said indenture are expressed to be vested in trustees to secure the payment of all moneys payable on such debenture bonds."

The "covering deed" of November, 1883, purported to be a conveyance

(1) 8 Q. B. D. 515.

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and assignment of the hereditaments, fixtures and chattels in terms rather larger than those used in the condition; the future chattels being not only those substituted for existing chattels, but also any brought upon the premises in addition thereto. This deed was not registered under the *Bills of Sale Act*, 1882.

Some months later the directors (in consequence of the decision in *Brocklehurst* v. *Railway Printing and Publishing Company* (1)) caused a new debenture to be issued, which was stated to be supplemental to the original bond of the holder to whom it was given, and purported to charge, in favour of the holder, the amount due on the debenture upon "the undertaking (of the company) and all its property, both real and personal, present and future, subject as to any part thereof to any subsisting mortgages":—

Held, 1. (affirming *Kay*, J.), that, assuming the covering deed to be void for want of registration under the *Bills of Sale Acts*, the intention to give the debenture-holders a valid charge, within the meaning of the *Bills of Sale Act*, 1882, s. 17, on the property comprised in that deed, was manifest on the face of the debentures, read in conjunction with the annexed condition, and amounted to an equitable contract which would be carried into effect to give a charge upon all the property of the company; and, accordingly, that the chattels intended to be charged with the money due on the original debentures were subject to an equitable charge in favour of the holders of those debentures.

2. That the supplemental debentures which were issued as part of, and in order to cure a supposed defect in the original issue, did not create a charge upon any property of the company which was not comprised in the original debentures.

THIS case came before the Court on appeal and cross appeal from a decision of Mr. Justice *Kay*.

The action was brought by debenture-holders against the company for the purpose of realising their security.

The debentures, which were issued in November, 1883, were in the form of an agreement under the seal of the company to pay the bearer on the 31st of December, 1888, the sum of £100 and also interest at 7 per cent. per annum in the meantime, and each debenture contained these words: "This debenture is issued upon and subject to the conditions indorsed thereon."

The fifth of such conditions was as follows:—

"The holders of the debenture bonds of this issue are entitled *pari passu* to the benefit of an indenture dated the 24th of November, 1883, and made between the company of the one part and *D. A. M'Bean Ross*, and *James Boardman* of the other

(1) W. N. 1884, p. 70.

part, whereby, subject to a sum of £75,000 and interest secured on mortgage, copies of which securities may be seen at the offices of the company's solicitors, Messrs. *Barnard & Co.*, 47, *Lincoln's Inn Fields*, the freehold buildings and premises of the company, situate in *Victoria Street, Westminster*, and all the machinery, fittings, fixtures, and furniture of the company in and about the said premises, and any other machinery, fittings, fixtures and furniture that may be substituted therefor during the continuance of the security effected by the said indenture, are expressed to be vested in trust to secure the payment of all moneys payable on such debenture bonds."

The deed of the 24th of November, 1883, purported to be a covenant and assignment of the hereditaments, fixtures and chattels (including not only chattels that might be substituted for existing chattels during the continuance of the security, but also any brought upon the premises in addition thereto) to trustees upon trust to enter and take possession and sell in case of default, and out of the proceeds to pay off the mortgage and debenture debts, and to pay the surplus, if any, to the company. It was not registered under the *Bills of Sale Act*, 1882.

On the 17th of June, 1884, a circular was issued to the debenture-holders, stating: "A Judge of the High Court has recently given a decision which seems to imply that the trust deed for the debenture-holders should have been registered under the *Bills of Sale Act*. The directors were advised by counsel that this was not necessary, and it is probable either that the decision referred to would be reversed on appeal, or that the deeds in the case which the Judge had before him would be found not to be on all fours with our deeds. The decision will probably not be appealed against, owing to the smallness of the matters in question. The directors have carefully considered the matter, and, feeling it to be their duty to protect the interests of the debenture-holders, they have caused a new debenture (framed to meet the decision above referred to) to be sealed in favour of each present holder of debentures, in the form annexed, and desire me to inform you that this new debenture can be received here by you or your agent (on your written authority) at any time."

The new debenture bond contained a statement that the com-

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pany "doth hereby charge in favour of the holder, or other the bearer, with such payments its undertaking, and all its property, both real and personal, present and future, subject as to any part thereof to any subsisting mortgages." And also: "This mortgage debenture bond is supplemental to the debenture bond No. ——, and dated ———, 1883, and is issued upon and subject to the conditions indorsed on the said debenture bond."

On the 17th of December, 1885, a petition to wind up the company was presented by creditors, and on the 5th of March, 1886, a winding-up order was made. On the 10th of May an official receiver was appointed.

The writ in the action by the debenture-holders was issued on the 21st of December, 1885.

The Plaintiffs in the action, with the trustees of the "covering deed" of the 24th of November, 1883, and certain of the debenture-holders, moved that *H. Driver*, who by order in the action of the 12th of January, 1886, had been appointed the receiver and manager of the property and assets of the company comprised in the deed of the 24th of November, 1883, might also be appointed the receiver of all additional chattels and properties comprised in the supplemental debenture bond.

The official liquidator, on the other hand, moved that the receiver and manager might be ordered to deliver over to the official liquidator all chattels comprised in the "covering deed."

It was agreed that the hearing of these applications should be treated as the hearing of the action.

The motions came on before Mr. Justice *Kay* on the 15th of July, 1886.

Hastings, Q.C., and *Maidlow*, for the liquidator:—

It is submitted that as the indenture of the 24th of November, 1883, was not registered under the provisions of the *Bills of Sale Act*, 1882 (45 & 46 Vict. c. 43), it is void. It is not within the saving of sect. 17 which enacts that "nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock, or goods, chattels, and effects of such company." There was therefore not a compliance with the statute, and the debentures are

void, and the chattels comprised in them are assets of the company. In *Brocklehurst* v. *Railway Printing and Publishing Company* (1), Mr. Justice *Field* held that a covering deed similar to the deed of November, 1883, was not a debenture within sect. 17, and was clearly a bill of sale, and therefore void for non-compliance with the Act.

[KAY, J.:—Does not each of the debentures, apart from the deed of November, 1883, amount to a contract to give a charge upon everything comprised in it? If that be so, is not the debenture within sect. 17.]

The debentures do not confer any charge, but are mere certificates of indebtedness, which contain a contract that the holder of them is to have the benefit of the deed, which is described as constituting the security. There is no charge but by the provisions of the covering deed of 1883, and as that, it is submitted, is void, the charge is not made effectual. The supplemental debentures are also void. By the articles of association the directors had no power to issue debentures other than for the purpose of borrowing money, and these debentures were not issued in consideration of any borrowing of money. [*Thompson* v. *Leake* (2) was also referred to.]

Kekewich, Q.C., and *W. Phipson Beale*, for the debenture-holders:—

The debentures are clearly by the operation of sect. 17 within the exception in the *Bills of Sale Act;* and they constitute a valid charge in equity quite irrespectively of the deed of November, 1883. It does not appear that this point was brought to the attention of Mr. Justice *Field* in the case of *Brocklehurst* v. *Railway Printing and Publishing Company*, and that decision should not, it is submitted, be followed now. It would be impossible to frame a deed in such a way as would comply with the provisions of the *Bills of Sale Acts*, 1878 and 1882, and a question may arise whether all covering deeds have not been rendered void by the statute notwithstanding sect. 17, which it is contended should receive a wide construction, as the statute is one which imposes

(1) W. N. 1884, p. 70. (2) 1 Madd. 39.

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restrictions. The effect of the section is to exempt from the operation of the statute every deed which is to secure debentures for money "upon the capital stock, or goods, chattels, and effects of" any company. By the *Companies Act*, 1862 (25 & 26 Vict. c. 89), s. 43, every limited company under the Act must keep a register of all mortgages and charges specially affecting the property of the company, and that was why debentures were considered not to require registration under the *Bills of Sale Act* of 1882. The supplemental debentures being in furtherance of the contract originally entered into are also valid.

Hastings, in reply.

KAY, J. (after stating the facts, continued):—

The first question is, whether the trust deed required registration under the *Bills of Sale Acts*, 1878 and 1882, as to the chattels comprised in it, or whether it is within sect. 17 of the Act, which provided that "nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock, or goods, chattels, and effects of such company." The Act does not say "containing a charge," but "secured upon" such chattels. These debentures are undoubtedly intended to be secured upon the chattels by this deed, which is commonly known as a "covering deed;" and if a debenture so secured is not within the Act, it is difficult to see why the covering deed should not also be excluded by the exception. By sect. 43 of the *Companies Act*, 1862, the company are bound to keep a register of all mortgages and charges affecting their property which is open to inspection by any creditor or member of the company at all reasonable times, so that the necessity for another registration under the *Bills of Sale Act* is not very apparent, and this must have been one of the reasons for excepting debentures from the operation of the Act. Moreover, the form of bills of sale given by the Act is not applicable to a covering deed, and it would be difficult so to frame such a deed as to satisfy the statute, and such a deed, if within the Act, could not create a charge upon the future chattels of the company (sect. 5), although debentures being excepted by sect. 17 may be

so charged. In the absence of authority, there certainly would be strong reason for giving to sect. 17 of the *Bills of Sale Act* a construction wide enough to include such a deed. The use of deeds of this kind to secure debentures was familiar long before the passing of that Act, and it is difficult to conceive that, if the Legislature intended only to except debentures which on the face of them created a charge, such language would have been used as I have read from sect. 17 of that Act.

However, in the case of *Brocklehurst* v. *Railway Printing and Publishing Company* (1), upon an interpleader summons before a Judge in Chambers, it was held that the trustees of a deed similar to this could not interfere with an execution creditor who had seized some of the company's goods. In that case the assignment had been registered under the *Bills of Sale Act*, 1882, but it was not in the form required by that Act, and was therefore treated by the learned Judge "as void for non-compliance with the Act." If this literal construction of the Act is to be adopted, it must be admitted, at any rate, that the debentures in this case are excepted by sect. 17. Then arises the question, if the covering deed be void, is there not enough in the nature of the transaction, or even upon the face of the debentures, to create an equitable charge upon the chattels mentioned in the deed, or at any rate, upon those specified in condition 5? The condition is between the debenture-holders and the company. Money is advanced to the company on the faith of it. It is not in form a contract to make a deed in future, but a condition that the holders "are entitled" to the benefit of an indenture dated the 24th of November, 1883, whereby, the condition states, these chattels "are expressed to be vested in trustees to secure the payment of all moneys payable on such debenture bonds."

The old and well-established rule of equity, as expressed by *Turner*, L.J., in *Re Strand Music Hall Company* (2), is that, "where this Court is satisfied that it was intended to create a charge, and that the parties who intended to create it had the power to do so, it will give effect to the intention, notwithstanding any mistake which may have occurred in the attempt to effect it." Taking a few only of the illustrations of this principle I refer to the case

(1) W. N. 1884, p. 70. (2) 3 D. J. & S. 147, 158.

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of *Burgh* v. *Francis*, before the Lord Keeper in 1670 (1), where it was held that equity would supply a defective mortgage against creditors who acquired a legal title afterwards, because they come in under the very person who is obliged in conscience to make the defective security good. In *Taylor* v. *Wheeler* (2) a defective mortgage which had become void was made good against the assignees of the bankrupt mortgagor. In *Jennings* v. *Moore* (3) a defective mortgage which had become void was made good against a subsequent purchaser with notice who had obtained the legal estate. And lastly, I refer to a case scarcely distinguishable from the present (*Re Strand Music Hall Company* (4)), where a limited company, having power to borrow on mortgage, which power might be exercised by the directors, borrowed £5000 upon a written agreement stating the security to be a deposit of mortgage bonds constituting a first charge on all the "property of" the company. These bonds were in blank as to the names of the obligees, and were therefore void. The directors also borrowed £2700 on a similar deposit of other like bonds, accompanied by a letter stating that the securities were to be held on the same terms and conditions as those under the agreement. The company being afterwards wound up, the official liquidator insisted that both the bonds and the agreements were invalid, and that the lenders of the money could only rank as simple contract creditors. In that case, *Turner*, L.J., having stated the doctrine of this Court in the words which I have quoted from his judgment, held that both these sums were a charge in equity upon the property of the company, and *Knight Bruce*, L.J., concurred in that decision.

In *Brocklehurst's Case* (5), to which I have before alluded, one of the debenture-holders was represented before the learned Judge, and made a claim under his debenture, and that claim seems to have been barred. At first sight it seems as though this decision would be directly opposed to *Holroyd* v. *Marshall* (6), where a mortgage of present and future chattels, though only equitable as to the future chattels, was held binding against an execution

(1) 1 Eq. C. Ab. 320.
(2) 2 Vern. 564.
(3) Ibid. 609.
(4) 3 D. J. & S. 147.
(5) W. N. 1884, p. 70.
(6) 10 H. L. C. 191.

creditor. The probable explanation is, that the *Bills of Sale Act*, 1878, having passed after the case in the House of Lords, a debenture creating an equitable charge would be void against an execution creditor under sect. 8 of that statute, the exception in sect. 17 of the later Act of 1882 not applying to the Act of 1878.

There is no question in this case that the company had power to borrow money on debentures, and to create by those debentures an equitable charge on the present and future chattels of the company. Assuming the covering deed to be void for want of registration or for any other reason by the mistake or neglect of the officers of the company, the intention to give the debenture-holders a valid charge upon the property comprised in that covering deed is manifest on the face of the debentures. The rule of equity therefore applies. The debentures are perfectly good and valid, and are excepted from the operation of the *Bills of Sale Act*, 1882, by sect. 17. If the covering deed required registration and is void as to the chattels for want of it, the debentures are, on the face of them, equivalent to a contract in equity to charge the money lent upon the chattels comprised in the deed. Those chattels are not quite accurately described in the condition on the debenture. The Court must look at the deed to see what property was to be charged. This is not treating the deed as in any way creating the charge. The charge is created by the debentures, which refer to an existing document, describing the property charged, which is for this purpose incorporated with them. The company, after a winding-up order, as was held in the *Strand Music Hall Case* (1), is bound by this equity. The official liquidator is not in the position of an assignee in bankruptcy or a creditor under execution: *Lindley* on Partnership (2). The question is simply between the grantors of the debentures and the grantees. I can see no possible answer to such a claim on the part of the debenture-holders.

This conclusion makes it unnecessary to rely upon the supplemental debentures, which, though rather differently expressed, I must understand to mean to effect a charge only upon the property which was intended to be assigned by the deed. If there

(1) 3 D. J. & S. 147. (2) 4th Ed. p. 1299.

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were not a sufficient charge by the original debentures, the equity against the company to make good the defect would be an ample consideration to support the supplemental debentures. I must declare that all the chattels intended to be charged with the money due on the original debentures are subject to an equitable charge in favour of the holders of those debentures, and the costs of these motions must be paid out of the estate.

T. F. M.

C. A. From this decision the official liquidator had appealed; and there was a cross appeal by the debenture-holders. The appeals were heard on the 11th of August, 1886.

Hastings, Q.C., and *Maidlow*, in support of the appeal by the official liquidator:—

The debenture itself does not create a charge but merely undertakes to repay the advance in respect of which it is given. The charge is created by the two documents, the bond and the deed of November, 1883, taken together; and as the deed is not within the exception of sect. 17 of the *Bills of Sale Act*, it is void for want of registration: *Brocklehurst* v. *Railway Printing and Publishing Company* (1); and accordingly no valid charge has been created in favour of the debenture-holders.

[LOPES, L.J., referred to *In re Asphaltic Wood Pavement Company* (2).

COTTON, L.J.:—The question is, whether by force of the condition annexed the debentures do not create an equitable charge.]

We submit that apart from the "covering deed" no charge was created, and from the absence of registration the covering deed was ineffectual for that purpose. Sect. 17 only applies to debentures which are "secured upon the capital stock, or goods, chattels, and effects of such company," and accordingly the charge must be specific and upon the whole undertaking and property: *Wheatley* v. *Silkstone and Haigh Moor Coal Company* (3).

We also say that the supplemental debentures were void for want of consideration and amounted to a fraudulent preference.

(1) W. N. 1884, p. 70. (2) 49 L. T. (N.S.) 159.
(3) 29 Ch. D. 715.

Kekewich, Q.C., and *W. Phipson Beale*, for the Plaintiffs, were not called upon.

Cotton, L.J.:—

This is an appeal by the official liquidator on the part of the company from a decision of Mr. Justice *Kay* upon a question which had arisen under the *Bills of Sale Act* (1878) *Amendment Act*, 1882. In 1883 debentures to the extent of £30,000 were issued by the company for £100 each, and a covering deed was executed. Neither the debentures nor the covering deed was registered as a bill of sale. The questions we have first to consider are, whether the debentures created an equitable charge on the property of the company, and whether they are within the saving clause of the Act, sect. 17. The debenture itself does not on the face of it create a charge on any property; the rights of the debenture-holders were defined by the annexed conditions, of which No. 5 is as follows:—[His Lordship read the 5th condition.]

Although the covering deed is void under the Act, there is in the debenture itself a contract that the debenture-holders shall have a charge upon what for present purposes I will call "all the property of the company." Undoubtedly, the covering deed being void, we cannot look at it as a contract to give security. The deed is altogether out of the way, because if not good as a bill of sale it cannot be good as a contract to give a bill of sale as security. I think that if the deed had not been executed at all there would have been in the debenture itself a contract to give such a security as was intended to be given by the deed. There is, in fact, upon the face of the debenture a contract to give such a security upon the property as the covering deed would have given but for the *Bills of Sale Act*. Security must be given in pursuance of condition 5. I do not think the covering deed would be necessary in order to give the debenture-holders a security, but one can look at the deed for the purpose of seeing what was contemplated and intended. Then it was said that the debenture itself is void. Does it come within the saving clause contained in sect. 17 of the *Bills of Sale Act?* It is contended, as I understand, that the clause was only intended to apply to debentures secured on the whole undertaking of the company,

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and it is said that if these debentures create a charge it is a charge only upon specific property of the company, and therefore that they are not debentures within the meaning of that section. But when looked at, the condition really applies to the same property as that included in the covering deed. In the absence of evidence to the contrary, that includes all the stock and store property of the company. One need not deal with the real estate, because we have no evidence that there is any real estate. Do not these words, "all the machinery, fittings, fixtures, and furniture of the company in and about the said premises, and any of the machinery, fittings, fixtures, and furniture which may be substituted therefor during the continuance of the security," *primâ facie* deal with and apply to all present and future property of the company which is described? In the absence of evidence, and having regard to the fact that this company is an hotel company, the proper conclusion is, that this debenture is sufficient to give a charge upon all the property of the company. Therefore, in my opinion, the debentures clearly come within sect. 17 of the Act of Parliament. I give no opinion as to the effect of the section on a charge on specific property, but I think these debentures do give a general charge upon all the property, including the stock and furniture of the company.

LINDLEY, L.J.:—

I am also of opinion that Mr. Justice *Kay* has taken the true view of the construction of the Act. It is admitted that what is called a "covering deed" was a deed executed by way of security for money lent to the company. Debentures were also given for the money lent. It is said now that the debentures are void because the deed is admitted on all hands to be void under the *Bills of Sale Act.* If we look at the debenture itself, it appears to me to refer to a contract to give a security such as is contemplated by sect. 17 of the *Bills of Sale Act.* That section provides that "nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company." I think the condition annexed to the debenture gave to the holders of those debentures such a security as they would have had if the covering deed had not been void. I have

some difficulty in coming to that decision, but it is obvious that the covering deed is referred to for the purpose of shewing what security the debentures would give to those who advanced money on the faith of them. It appears to me, therefore, that the order of Mr. Justice *Kay* was right, and that this appeal ought to be dismissed.

LOPES, L.J.:—

The question arises under sect. 17 of the *Bills of Sale Act*, 1882. The first question to be considered is, whether the debentures create a charge upon the property of the company. Looking at the debenture itself, I think that it does not create a charge, but then condition 5, which is attached to that debenture, appears to me to refer to the "covering deed." When that deed is duly considered it appears to me to comprise all the property of the company; and the debenture and covering deed taken together appear to me to contain a contract to give a security upon the property mentioned in that deed, and which, as I have already said, appears to be all the property of the company. That being so, I am of opinion that the debentures are debentures within sect. 17, "secured on the capital stock, or goods, chattels and effects of such company." I think, therefore, that the judgment of the Court below was right, and that this appeal ought to be dismissed.

W. Phipson Beale (*Kekewich*, Q.C., with him), in support of the cross appeal that the order of Mr. Justice *Kay* might be varied by including therein a direction to the effect that all the chattels and property of the company expressed to be included in the supplemental mortgage debenture bonds of the Defendant company were subject to an equitable charge in favour of the Plaintiffs.

We submit that an additional security was given by the supplemental debenture. If it should be held that the supplemental debentures are void for want of consideration, then we shall contend that such of them as were given in respect of debts which accrued after the first issue, were given for good consideration and are valid.

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Maidlow (*Hastings*, Q.C., with him), for the official liquidator, *contrà*, contended that persons advancing their money after the issue of the supplemental debentures came in *pari passu* with the original debenture holders. The supplemental debentures were only intended to cure the supposed defects of the first issue, and both were to be exactly on the same footing, without any advantage to the one over the other.

Kekewich, in reply :—

There is no contest between the holders of the first and of the second issue, but an additional security is given by the second debenture.

COTTON, L.J. :—

When we gave our previous judgments we thought that all the points in dispute were before us, but there is a cross appeal upon which it has been contended that the holders of the debentures which were issued in 1884 have a charge upon some property which was not comprised in the charge created by the original debentures of 1883. As regards the property charged by the original debentures, we held, practically, that it was "all the capital stock, or goods, chattels and effects of the company." The words are sufficient to include everything except the consumable stores, cash in hand, and book debts. This is an hotel company, and, in my opinion, the machinery, stock, and fittings in an hotel would properly include everything necessary for the carrying on of the business of an hotel, anything tangible in the shape of plate, linen, glass, and everything else of which the furniture of an hotel consists. Then there are several other things—wines, book debts, cash in hand; and it is contended on behalf of those who are holders of both the first and second debentures that those things are included in this charge by reason of the words used in the mortgage debenture issued in 1884. There was also another question, whether the holders of the original debentures, to whom these additional debentures were granted in 1884 and who then advanced no money, had given any consideration. In my opinion, it is unnecessary to decide that point, although I think they did.

The learned Judge did not decide in favour of any priority of issue or priority of advance of money, but regarded the debentures as creating a claim against whatever is comprised in the original security. I think the debentures of 1884 are a charge upon the property comprised in the former debentures. They are not a charge on any particular property, but give an entire security upon the property which was intended to be made a security by the debenture of 1883. Although the words of the debenture of 1884, taken by themselves, would, in my opinion, have a larger construction than the words in the debenture of 1883, yet looking to the fact that these documents were issued as part of the issue of the £30,000 mortgage debentures already authorized, I think upon the true effect of the contract that the debentures of 1884 simply give a charge upon that property which was thought not to be effectually charged by the original debentures, but which we have held was all effectually charged by those debentures. The debentures of 1884 are merely by way of a further charge upon property already mortgaged, and not a security upon any other property. In my opinion, though the question was apparently not argued in the same way before him, the conclusion of Mr. Justice *Kay* was right that the second debentures are supplemental debentures, and do not include or charge any property not comprised in the original debentures.

LINDLEY, L.J.:—

I have come to the same conclusion. We cannot arrive at the effect of the two series of debentures by regarding the language of each separately, but we must look at the whole of the security which was given to cover the advance of this money. The debenture holders did not advance this money upon the faith of the two sets of debentures. The object of the second debentures is shewn by the circular which accompanied them—it was merely to patch up what was supposed to be a defect in the original security. The true construction of the two sets of documents is that the holders of the second debentures have a charge *pari passu* with the first or original debenture holders on all plate, linen and china, &c., not including book debts, and so on. That puts them all in the same position.

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LOPES, L.J.:—

When I gave my previous judgment, I was not aware of the cross appeal with regard to the supplemental debentures. I do not think they were intended to cover property which was not comprised in the original debentures. I think that the effect of the supplemental debentures was to make good a supposed defect; not for the purpose of giving a charge upon any additional property. I entirely agree with what has been said by the other members of the Court.

Solicitors: *Ford, Lloyd, & Co.*; *Travers Smith & Braithwaite.*

F. G. A. W.

C. A. 1886 *Nov.* 2, 3.

MOWATT *v.* CASTLE STEEL AND IRON WORKS COMPANY.

[1883 M. 361.]

Company—Issue of Debentures—Debentures sealed but not delivered—Debentures payable to Bearer—Estoppel—Companies Act, 1862, *s.* 153 [*Revised Ed. Statutes, vol. xiv., p.* 235].

The directors of a company directed their secretary to make arrangements for the issue of debentures, for payment of advances to the company. The debentures were accordingly prepared, being made payable to bearer, and sealed and stamped; and were placed in a box the key of which was kept by the secretary. The box was deposited in the office of the company, which was also the office of *T.*, one of the directors, who had made large advances to the company.

Some of the debentures were given out by the secretary to an agent for him to issue them to the public, which he did not succeed in doing. The company was wound up by order of the Court. After the commencement of the winding-up the agent returned the debentures to *T.*, who gave some of them to *R. & Co.*, his own creditors. They took them, believing that they had been regularly issued and that *T.* had power to dispose of them:—

Held (affirming the decision of *Chitty*, J.), that the debentures had not been issued before the commencement of the winding-up.

Held, also, that the other debenture holders of the company were not estopped from disputing the validity of the debentures held by *R. & Co.* Whether the company would have been estopped, *quære.*

THE action in this case was brought by *F. Mowatt*, on behalf of himself and all other the holders of the debentures of the

Castle Steel and Iron Works Company, Limited, against the company to enforce their security by the appointment of a receiver and other relief.

On the 26th of July, 1884, judgment was given for the Plaintiff at the trial, and it was ordered that an account should be taken of what was due to the Plaintiff and the other debenture holders.

Among others, Messrs. *Robins & Co.* carried in a claim in respect of forty debentures of £10 each, under the following circumstances:

The company was registered on the 13th of February, 1882. It had an office at *Milford;* and a room in the office of Messrs. *Lake & Taylor* in *Victoria Street, Westminster*, was used as the *London* office of the company. Meetings of the directors sometimes took place at *Milford* and sometimes in the *London* office, and the company's secretary attended all the meetings at both places.

Messrs. *Lake & Taylor* were both directors of the company, and their firm had advanced considerable sums towards carrying on the business of the company.

The company had power to issue debentures to the amount of £30,000. Debentures to the amount of £20,000 were issued immediately on the formation of the company for payment to *Lake & Taylor* for the value of the business which the company acquired and carried on, and no question arose concerning that issue.

On the 20th of March, 1882, the directors instructed the secretary to make arrangements for the issue of debentures for the remaining £10,000, and at a meeting on the 5th of June the directors ordered the company's seal to be affixed to the new debentures. A thousand debentures of £10 each were accordingly prepared, signed, and sealed, bearing date the 10th of May, 1882, by each of which the company bound itself to pay the bearer the sum of £10 on the 10th of May, 1887, with interest at 6 per cent. Each debenture had certain conditions printed on it, one of which was as follows:—"The bearer of this debenture and the bearer of each of the coupons annexed thereto will be entitled to the moneys specified in such documents respectively, free from any equities between the company and the original or any intermediate holder thereof respectively."

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The debentures were not stamped till the 22nd of September, 1882. They were deposited in a tin box marked with the company's name, which was sometimes kept at *Milford* and sometimes in *London*, the key being kept by the secretary. On the 31st of October, 1882, the box was brought from *Milford* to *London*, and placed in the company's office there. On the 3rd of November, 1882, 400 debentures were taken out of the box by the secretary and handed to Mr. *J. Nelson*, for the purpose of being issued by him to the public.

On the 18th of December, 1882, a petition was presented to wind up the company; and an order for winding it up compulsorily was made on this petition on the 16th of January, 1883.

On the 21st of December, 1882, the secretary wrote to Mr. *Nelson* to return the debentures, as he had failed to issue them to the public. Mr. *Nelson* accordingly returned them to Messrs. *Lake & Taylor* and Mr. *Taylor* distributed them among persons having claims on his firm. Among others, Messrs. *Robins & Co.* received forty of the debentures before the winding-up order, as security for a claim of £679 for cement supplied by them to *Lake & Taylor*. It was alleged by *Lake & Taylor* that the directors had arranged that the debentures should be issued to them as security for the money advanced by them to the company; and *Robins & Co.* asserted that they supposed that the debentures had been properly issued by the company to *Lake & Taylor*.

The claims of *Robins & Co.* and other holders of debentures in similar circumstances were brought before Mr. Justice *Chitty* in Chambers and adjourned into Court. His Lordship refused the applications, holding that the debentures had never been issued by the company; that they were in the possession of the company, and not of *Lake & Taylor*, when they were entrusted to Mr. *Nelson*, and when they were returned by him; that they were handed to him on behalf of the company, not of *Lake & Taylor;* and that they were never out of the possession of the company till after the commencement of the winding-up, and, therefore the title of the holders was barred by the 153rd section of the *Companies Act*, 1862. And he held that the company was not estopped from denying that the date on the debentures was not the date of issue.

From this decision *Robins & Co.* appealed.

Farwell, for the Appellants:—

The debentures were issued to *Lake & Taylor* to cover their advances to the company. There was a resolution of the company to issue them, and this is followed by the sealing, signing, and stamping of them, and they were then placed in the custody of *Taylor*. That is sufficient evidence of issuing them.

The company and the other debenture holders who claim through the company are estopped from saying that the new debentures were not issued. They were made payable to bearer and were perfected and sealed and stamped, and if they are then found in the possession of *bonâ fide* holders the company cannot say they were not issued. They have come into the holders' hand entirely through the acts of the company. All the debenture holders must be treated alike. Those who had the first issued took them on the footing that those subsequently issued would rank *pari passu* with them: *Ingham* v. *Primrose* (1); *Goodwin* v. *Robarts* (2); *Burkinshaw* v. *Nicolls* (3); *Marston* v. *Allen* (4); *Shaw* v. *Port Philip and Colonial Gold Mining Company* (5); *In re Romford Canal Company* (6).

The debentures were issued to *Lake & Taylor* before the commencement of the winding-up. Therefore the case is not affected by the 153rd section of the *Companies Act*.

Macnaghten, Q.C., and *Latham*, for the Plaintiff, were not called on.

Macaskie, for the trustees in the bankruptcy of *Lake & Taylor*.

COTTON, L.J.:—

This is a claim by the holders of certain debentures in a joint stock company, and the appeal is brought from an order made in an action by one debenture holder on behalf of himself and the other debenture holders against the company. The only question for our decision is whether Messrs. *Robins & Co.*, who are

(1) 28 L. J. (C.P.) 294.
(2) 1 App. Cas. 476.
(3) 3 App. Cas. 1004.
(4) 8 M. & W. 494.
(5) 13 Q. B. D. 103.
(6) 24 Ch. D. 85.

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the holders of these debentures, can come in under the judgment with the other debenture holders and enforce their right against the company.

The debentures were in fact in the hands of Messrs. *Robins & Co.* on the day when the order for winding-up was made. They obtained them from *Taylor* for valuable consideration.

The question is whether these debentures were issued by the company before the commencement of the winding-up. That resolves itself into two questions; first, whether they were issued at all by the company; and, secondly, if so, whether they were issued before the commencement of the winding-up. The account which *Taylor* gives of the matter is that his firm had a claim on the company for which they had received debentures for £20,000, that they made further advances, and that in March, 1882, the company directed the secretary to make arrangements for the issue of debentures for £10,000 more, to repay those advances. The debentures bore date the 10th of May, but they were not sealed till the 5th of June, and they were not stamped till the 22nd of September. From that date till November they were dealt with as in the possession of the company, and were not given to any person for the purpose of being issued. But on the 3rd of November 400 of the debentures were given to *Nelson* to be issued, and he having failed to issue them, they were returned on the 28th of December, and came into the possession of *Taylor*. *Taylor* contended that, being a director of the company, he had a control over them, and that he might give them to his creditors. I think that is wrong. They were never placed in his hands in such a way as to give him a right to deal with them. It is impossible to say that the debentures had been dealt with by the company in such a way as to entitle *Taylor* to say that he had a right to deal with them as he pleased. It is argued that as they bore date the 10th of May, 1882, that must be treated as the day on which they were issued. But the debentures must be delivered before they can be binding on the company. The fact of their being dated and sealed does not shew that they were delivered. There was a resolution that debentures to the amount of £10,000 should be sealed, but not that they should be delivered. They were accordingly perfected and sealed, but they

were not delivered, and if not delivered and issued they could not belong to *Taylor*.

We therefore come to the same conclusion as the learned Judge in the Court below, that these debentures were never issued or given to *Taylor* so as to entitle him to say that he was the holder of them.

But another point has been raised before us. It is said that the company and the other debenture holders are estopped from saying that these bonds were not issued. I will not go through the cases which were cited on the question whether the company was estopped, because it is clear that even if the company is estopped (though I do not say that it is) the other debenture holders cannot be bound. It is said that the debenture holders took on the footing that all the debentures were to take *pari passu*. But what does that come to? It only means that those who are rightly debenture holders should so rank, not persons whom the company had wrongfully admitted to be debenture holders. If, after issuing debentures the company issued others, they could not by estoppel bind those who had previously acquired rights against them. The company might bind themselves by an admission, but a man cannot bind by his admission those who do not claim under him, but who before the admission had acquired a right.

I am, therefore, of opinion that the question of estoppel does not assist the Appellants' case, and that the appeal must be dismissed.

BOWEN, L.J.:—

I am of the same opinion. The evidence appears to me to shew that the new debentures had never been issued. Then it is contended that the company and the other debenture holders are bound by estoppel. Whether the company is bound by estoppel I do not say; but I do not see a shadow of a ground for saying that the other debenture holders are bound.

FRY, L.J.:—

I am of the same opinion. The conclusion of fact to which I have arrived is that at the time of the commencement of the

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winding-up these documents were merely pieces of paper. Except the mere fact of sealing them, everything took place after the commencement of the winding-up. They were given by the company to *Nelson*, and were in his custody till after the winding-up; then they were returned to the company; and the possession of *Taylor* and of the Appellants was altogether after the winding-up. I agree as to the other points with the other Lords Justices.

Solicitor for the Appellants: *J. H. Hortin.*
Solicitors for the Plaintiffs: *Robins, Cameron, & Kemm.*
Solicitors for trustee of *Lake & Taylor: Davidson & Morriss.*

M. W.

KAY, J.
1886
Nov. 3.

In re JONES.
GREENE *v.* GORDON.

[1886 J. 916.]

Will—Power of Appointment up to specified Amount—General Devise and Bequest—Exercise of Power to full Amount—Wills Act (1 *Vict. c.* 26), *s.* 27 [*Revised Ed. Statutes, vol. viii., p.* 35].

A testator by his will, dated in 1884, after giving his residuary real and personal estate upon certain trusts for the benefit of his widow and his daughter and the daughter's children, empowered his widow by will to appoint that any sum or sums of money not exceeding £20,000 should after her death be raised and applied as she should think fit.

The widow by her will, dated in 1885, devised and bequeathed all her estate and effects real and personal which she might die possessed of or entitled to unto her daughter absolutely:—

Held, that by force of the 27th section of the *Wills Act*, the general devise and bequest in the widow's will operated as an exercise to the extent of £20,000 of the power of appointment contained in the will of the testator.

ORIGINATING SUMMONS.

John Jones, by his will, dated in 1884, devised and bequeathed his residuary real and personal estate to trustees upon trust for sale, conversion, and investment, and directed them to hold the trust funds upon certain trusts for the benefit of his wife and his daughter Mrs. *Greene* (who was his only child), and the children and remoter issue of his daughter; and the testator declared that notwithstanding the trusts thereinbefore declared in favour of the issue of his said daughter it should be lawful for his wife "by will or codicil to appoint that any sum or sums of money not exceeding altogether the sum of £20,000 shall after her decease be raised and paid or applied to or for the benefit of such person or persons, for such purposes, upon such conditions, and with such restrictions as my said wife shall think fit."

John Jones died on the 19th of May, 1885, leaving his wife Mrs. *Mary Anne Jones* and his only daughter him surviving. Mrs. *Mary Anne Jones* died on the 26th of May, 1885, having made her will, dated the 24th of May, 1885, in the following terms:—"I devise and bequeath all my estate and effects real and

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personal which I may die possessed of or entitled to unto my daughter *Harriet Rowland Greene* absolutely for her sole and separate use." And the testatrix appointed her said daughter and Mr. *Greene*, her daughter's husband, executrix and executor of her will.

After the death of Mrs. *Mary Anne Jones* the question arose whether or not this general devise and bequest in her will operated as a valid and effectual exercise of the testamentary power of appointment limited in her favour by the will of the testator *John Jones*; and an originating summons for the purpose of having this question determined was taken out, adjourned into Court, and now came on for hearing.

Ingle Joyce, for the Plaintiff, Mrs. *Greene*, in support of the summons:—

The exact point, *i.e.*, the effect of a general devise or bequest with reference to a power to appoint any sum not exceeding a specified amount, does not seem to have arisen before. Sect. 27 of the *Wills Act* (1 Vict. c. 26) enacts that a general devise or bequest of the real or personal estate of the testator shall be construed to include any real or personal estate which he "may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." The testatrix here has devised and bequeathed all her estate real and personal which she might die possessed of or entitled to: that is the same thing as a gift of all her real and personal estate, and does not shew any intention to deal only with her property other than that over which she had a mere power of appointment: *Frankcombe* v. *Hayward* (1). Consequently the gift must be construed to include any real or personal estate which the testatrix had power to appoint in any manner she might think proper. She had power to appoint this £20,000 in any manner she might think proper, and the gift, therefore, includes the sum in question, and operates as an exercise of the power. Moreover, the testatrix here had no other power of appointment: so that the case is not like *Pomfret* v. *Perring* (2), where it was held that a gift in a

(1) 9 Jur. 344. (2) 5 D. M. & G. 775, 781.

will purporting to be by virtue of every power in a certain settlement "or otherwise howsoever" was not an exercise of a power of revocation and new appointment, where there were other powers to which the words could properly apply. And there *Turner*, L.J., said that "if there was no power except one of revocation and new appointment, it would be different, and the general words would be then held to be an exercise of that power."

Begg, for the trustees and executors and for Mr. *Greene*:—

This is not a case within the 27th section of the *Wills Act*.

1. The power of appointment is not a general power within the meaning of the section; nor even a simple power to appoint £20,000. It is a compound power to do two things, *i.e.*, to direct (*a*) the raising of any sum not exceeding a specified amount, and afterwards (*b*) the manner in which it is to be paid or applied. And having regard to the previous trusts it is in nature of a power of revocation and new appointment, which should not be held to have been exercised unless the intention to exercise it is made clear: *Pomfret* v. *Perring* (1); *Palmer* v. *Newell* (2); and a general bequest would not charge the estate under such a power: *Davidson's* Precedents (3).

2. This is neither "real estate" nor "personal estate" which the testatrix "has power to appoint," her only power is to direct the raising of some sum of money not exceeding a given amount.

3. There is evidence of "a contrary intention" on the face of the will, for what the testatrix deals with is only that which she "may die possessed of or entitled to," and no reference is made to anything over which she had a mere power of disposition.

KAY, J.:—

I think that this case is covered by the Act. As I read the statute it is useless to speculate about the intention of the testatrix. The Court may have a strong suspicion that the testatrix did not intend to exercise what is called a general power of appointment, and that if she had been told that she had

(1) 5 D. M. & G. 775. (2) 20 Beav. 32, 38.
(3) 3rd Ed. vol. iii. pp. 698, 1048.

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done so, she would have been very much surprised to hear it. But the statute renders any such speculation fruitless. The 27th section, which is that in point, provides as follows:—[His Lordship then read the section, and, after stating the facts as to Mr. *Jones's* will, continued:—] I pause there to observe that the power conferred by the will of *John Jones* was practically a power to appoint part of a residue comprising real and personal estate, in any manner that Mrs. *Jones* might think proper, and one which might be exercised by her simply appointing £10,000 or £20,000, as the case might be, to *A. B.*, a stranger. What happened was this, a few days after her husband's death she made a will whereby she devised and bequeathed to her daughter all her real and personal estate in the largest terms. The statute says that such a devise and bequest shall include any real or personal estate, as the case may be, which a testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will. The question is—is there a contrary intention shewn on this will?

It has been argued, first, that this is not a power to appoint a sum of £20,000, but to appoint that a sum not exceeding £20,000 shall be raised and paid, and that this makes a difference. The answer to that is, that I must read the words of the section as if they referred to the exercise of every power of appointment which the testatrix might have, and if that is so, those words would cover a power such as this to appoint that a sum not exceeding £20,000 may be raised.

Then in the second place it was said that this power was like, and must be treated as, a power of revocation and new appointment, and *Pomfret* v. *Perring* (1), was referred to, where it was held that a general devise and bequest in exercise of any power whatsoever given to a testatrix by certain indentures or otherwise howsoever did not extend to property which the testatrix could not appoint without exercising a power of revocation. But it must be observed that in that case there was another power to which the appointment could apply, and if that had not been so, no doubt other considerations would have prevailed. However to that

(1) 5 D. M. & G. 775.

contention, the answer is this, that if she had simply said, "I appoint £20,000 which I have power to appoint under my husband's will," that would have been a good exercise of the power, and there would have been no revocation, no more at least than in the sense in which in any ordinary case, the exercise of a power of appointment over property which in default of appointment is given over to some one else, to a certain extent revokes the provisions in the instrument creating the power in default of its exercise, and so it would only be a revocation to the extent to which it defeated the provisions in default of appointment in the husband's will. I cannot speculate as to the intention of the testatrix, but the will must be taken as being within the statute, and by force of it to be an exercise of the power unless a contrary intention is shewn in it.

Then is there any indication of a contrary intention here? I cannot find any, and I accordingly declare that the will of Mrs. *Jones* operated as an exercise of the power of appointment contained in her husband's will to the extent of £20,000. I may say that I am perhaps aided in coming to this conclusion by the fact that the person to take the benefit under Mrs. *Jones*' will is her only daughter. For all I know she might, when making this will, have had the statute brought to her notice, and framed her will in this way so as to bring it within the statute.

Solicitors for Mrs. *Greene*: *Ingle, Cooper & Holmes.*
Solicitors for Defendants: *Duffield & Bruty.*

W. W. K.

KAY, J.
1886
June 28.

In re OLIVE.
OLIVE *v.* WESTERMAN.

[1880 O. 02.]

Trustees—Negligence—Mortgage of Houses—Insufficient Security—Valuation—Rules as to Amount to be advanced.

Trustees having power to make investments of trust moneys upon securities in *E.* and *W.*, including leaseholds for terms of years, invested trust moneys upon mortgage of a leasehold property which consisted of cottages. The evidence shewed that a proper valuation of the property was not obtained by the trustees, and that the sum advanced by them was about two-thirds of the real value of the property, which subsequently became depreciated:—

Held, that the investment was not fit and proper for the trustees to make, that the trust moneys were advanced upon an insufficient security, and that the trustees must make good the loss which had been occasioned to the trust estate.

The rule to be followed by trustees in making advances upon mortgages explained.

Adjourned Summons.

William Olive, who died on the 28th of April, 1876, by his will made in May, 1875, gave power to his three trustees to make investments of moneys, bequeathed to them upon trust for his daughter, on real securities in *England* and *Wales*, "or on the security of leasehold hereditaments situate as aforesaid and held for a term or terms of years." The action for the administration of the testator's estate was commenced in 1880, and on the hearing the usual inquiries and accounts were directed to be made and taken. The Chief Clerk certified that in 1878 the trustees made an investment of a sum of £8300 by lending it upon mortgage of a leasehold property situate at *Broughton, Manchester*, which consisted of cottages, some of them being let to weekly tenants. In July, 1881, the interest on the moneys advanced being in arrear and unpaid the trustees entered into possession of the property, and they continued in possession. The Chief Clerk certified that the investment was not fit and proper for the trustees to make, and that the trust moneys were advanced upon an insufficient security. Evidence for the trustees was produced to shew that at the date of investment the cottages

were all let and in good condition, and that the moneys advanced were equal to about two-thirds of the value of them; but, it was stated, that since 1878 house property in this part of *Manchester* had, in consequence of the depressed state of trade, become depreciated to an enormous extent. Evidence for the Plaintiffs was adduced to shew that this cottage property was at the date of the mortgage even of less value than the sum advanced, and that the trustees did not obtain any proper valuation of it. The particulars of the evidence are fully stated in the judgment.

The trustees took out a summons asking that the Chief Clerk's certificate might be varied by striking out, *inter alia*, the part which certified that the investment was not fit and proper, and that the moneys were advanced upon an insufficient security. It was adjourned into Court and now came on to be heard.

W. Pearson, Q.C., and *Woodroffe*, for the trustees, submitted that their evidence shewed that they believed the information which was obtained as to the value of the property was sufficient, and that therefore they were justified in making the advance. As the depreciation in the value of the property could not be foreseen the trustees ought not to be held liable to make good any loss in respect of the investment.

Hastings, Q.C., and *E. S. Ford*, for the Plaintiffs, opposed the application, and submitted that the general rule was that trustees ought not to make any investment of trust funds upon the mortgage of house property to an amount exceeding one-half of the real value of it; and that the Defendants ought to shew, which their evidence did not do, that they took the necessary steps to obtain a proper and reliable valuation of the property before they made the advance. As they had not done what they ought to have done they should be held liable for any loss that might occur and the application should be refused. They referred to the cases of *Stickney* v. *Sewell* (1); *Stretton* v. *Ashmall* (2); *McLeod* v. *Annesley* (3); *Budge* v. *Gummow* (4); *Fry* v. *Tapson* (5).

(1) 1 My. & Cr. 8.
(2) 3 Drew. 9.
(3) 16 Beav. 600.
(4) Law Rep. 7 Ch. 719.
(5) 28 Ch. D. 268.

KAY, J.
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KAY, J.:—

In this case I have to deal with certain investments and other transactions by trustees with part of the testator's property. There has been no suggestion that there was any corrupt dealing or anything of that kind, and I have no reason to doubt that they did what they thought was the best thing to be done with reference to the property of the testator. [His Lordship then commented upon the conduct of the trustees in respect of certain investments in land, which he considered was purchased at an extravagant price, and continued:—] Then comes that which is really the difficult part of the case. People nowadays talk as if the rule in reference to not lending more than one-half of the estimated value upon house property by trustees was something new. I have certainly seen an intimation of that kind. The rule, however, was, though not in those very words, stated substantially by Lord *Cottenham* in the year 1836, in the case that has been referred to of *Stickney* v. *Sewell* (1). There the Lord Chancellor said the rule was that trustees ought not to lend more than two-thirds upon freehold agricultural property; and in the case of house property they ought not to lend so much as two-thirds. Since that time many other cases, including those that have been cited of *Stretton* v. *Ashmall* (2) and *McLeod* v. *Annesley* (3) have been decided, and the same rule has been stated and acted upon.

A very familiar and easy reference to the rule can be found in *Lewin* on Trusts, at p. 325 of the last edition, and, I believe, in all the earlier editions: Mr. *Lewin* said, "Trustees cannot be advised to advance more than two-thirds of the actual value of the estate, if it be freehold land; and if the property consists of freehold houses, they should not lend so much as two-thirds, but say, one-half of the actual value. The rule, however, of two-thirds or one-half is only a general one; and where trustees have lent on the security of property of less value, but have acted honestly, they have been protected by the Court, and have been allowed their costs. As to buildings used in trade, and the value of which must depend on external and uncertain circumstances,

(1) 1 My. & Cr. 8. (2) 3 Drew. 9.
(3) 16 Beav. 600.

trustees would not, in general, be justified in lending so much as one-half." For the proposition that if trustees have acted honestly, though they have lent more than one-half, they will be protected by the Court, reference is made to the case of *Jones* v. *Lewis* (1), reversed on appeal, it is believed, by Lord *Truro* on the 26th of February, 1852, but the grounds are not known, and others. No one ever said that the rule as to lending not more than one-half the value of house property was a hard and fast rule. Of course, when applying that rule, all the circumstances must be looked at. But surely trustees when they are lending trust moneys upon house property—knowing, as I must take them to know, the rule, which has been certainly followed since 1836—should tell their valuers that they are lending trust moneys, and that they do not desire to lend more than one-half the actual value of the property. They should ask for a valuation which would enable them to judge whether they are justified in lending the amount they propose to lend. Did these trustees do that? So far as I can see the only trustee who took any trouble or precaution in the matter was Mr. *Hicks*, but I have no statement how he came to know the property, what was the reason that induced him to lend money upon it, who introduced the matter to him, or anything of the kind. On the other hand, there is no statement which would lead me to suppose that he acted in any way as an interested person in the matter, or that he intended to do anything but his duty as trustee. What he had was an account of the mere letting value, and, instead of getting anything like a formal valuation from Mr. *Lynde* (a surveyor and valuer at *Manchester*), he got a letter, dated the 11th of October, 1878, to this effect:—"Dear Sir,—*William Olive's* trust. I have inspected the under-mentioned property as per your instructions. It consists of twenty-one dwellings and one shop, in *Higher Broughton*." That was a suburb of *Manchester*, but hardly a suburb now, because it is almost in *Manchester* itself. Then he gave the particulars of the houses and said, "The whole is good property, and well let. The gross rental I estimate at £713 in value, the actual rental is £720. The net rental is £657, after paying £63 chief rent. That is taking the actual rents, but if £63 chief rent is

(1) 3 De G. & Sm. 471.

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deducted from the £713 it would make it something less. That would make it only £650 net rental. Then he said: "I consider you would be safe in lending £8000 on mortgage on the property." The mortgagor wanted £8300, and accordingly a further representation was made to Mr. *Lynde*, who wrote on the 30th of October, 1878, thus: "Referring to my letter to you of the 11th inst., in which I recommended you to lend the sum of £8000 upon certain property situate at *Higher Broughton*, I have no hesitation in assuring you that you would be safe in lending £8300 upon the said property, if, as you say, this sum will be more convenient for you than the £8000 mentioned in my previous letter." That was all. There was no statement how many years' purchase the property was worth, or what was the total value of it. There was no criterion given, except that the net rental would be £650; and twenty years' purchase would amount to £13,000. To lend £8300 upon house property worth only £13,000 would be very much outside the rule. But this was house property. One of the houses was a shop, and the rest were small tenements, and if the question had been asked, "Would it be a fit investment to lend £8300 upon house property, the outside value of which is £13,000?" surely most people would have said, "No, you ought not to lend £8300 upon such a security." But was that the value? Upon this point there is the evidence of Mr. *Chadwick*, an auctioneer and valuer at *Heywood*, who said that he had made a report upon the property, and he estimated the value of it to be £11,049 10*s*. Mr. *Chadwick* in his affidavit said that: "In the year 1878, and for a considerable time subsequently thereto (in fact the practice has almost invariably prevailed down to the present time with trustees and others), it was considered, and the common rule was, that a sum of money equal to two-thirds of the value of the property given in mortgage was a safe and sufficient amount to lend and advance upon mortgage, and in lending the said sum of £8300 the Defendants did not, in my opinion, advance more money than, at the time in their capacity of trustees, they ought to have done." In other words that gentleman said: "I do not think Lord *Cottenham* was a proper judge on the matter. I set up my judgment, and I say that two-thirds of the value was the

proper amount for trustees to lend." I cannot hesitate as between Lord *Cottenham* and Mr. *Chadwick*, and I must take Lord *Cottenham's* view rather than that of Mr. *Chadwick*. The evidence of Mr. *Chadwick* is supported by that of Mr. *Merchant*, who, it seemed, had been the agent of the trustees since they took possession of the property in the year 1881. His evidence was answered by an affidavit of Mr. *Saxton*, who had at that time been in practice as an auctioneer and valuer at *Manchester* for ten years, and he valued the property at £6953. That affidavit has not been answered; and, whereas the other witnesses gave no data whatever to go upon, Mr. *Saxton* gave a record of the actual sales of property made in *Broughton* for a year before this investment was made. Taking his figures as a basis, at thirteen years' purchase of the net rental of £657 instead of £650, the amount is £8541 as the total value. Supposing the trustees had made this investigation, and had found what was the average selling price of property of this description in *Higher Broughton*, and had been told, "You cannot get more than between £8000 and £9000 for it," would they have been justified in making this investment? Obviously and clearly not. It would have been extravagantly wrong to have made any investment of the kind. Then it was said: "We do not know what the properties which Mr. *Saxton* refers to were; but as to this property we do know that it was in very good repair." That is quite true; but the question is, "Was there any ground for supposing that property of this class would sell for anything like twenty years' purchase?"

I have other means of judging of the value, because it seems that both in 1881 and in 1885 a good many of the houses were let at weekly rentals, and everybody knows that the ordinary course when property is let to weekly tenants, is that the landlord pays the rates and taxes. Consequently there would be outgoings with respect to the property, beside the chief rent, and so far as it was let at weekly tenancies, rates and taxes as well. There is another circumstance which certainly the trustees must have been very blind if they omitted to observe. When they made the investment the property was insufficiently paved and sewered, and they had actually to pay, after they took possession in 1881, the sum of £669 for the expenses of the paving and the sewering

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in the neighbourhood of the property. Could they have acted with anything like proper care or caution in making the investment when it turned out that the owners of the property under an existing mortgage were liable to be called upon for so large a sum as £669 for the expenses of paving and sewering? I cannot come to any other conclusion than that, acting, as I treat them as having acted throughout, without any corrupt intentions, but with the desire of benefiting the testator's estate, they made a most incautious investment. It was an investment which so far departed from the rule which trustees are bound in the main to observe, that although they did take the opinions which I have referred to, of Mr. *Lynde* and others, they ought not to have been satisfied with those opinions, but they ought to have looked into the matter with more care, and I must therefore support the Chief Clerk's certificate in this respect.

Solicitors: *Robinson, Preston, & Stow*, agents for *Thomas S. Grundy, Bury, Lancashire; Pritchard, Englefield & Co.*, agents for *Beaumont & Rigby, Manchester.*

T. F. M.

CHITTY, J.
1886
Aug. 11, 12.

In re BARBER. BURGESS *v.* VINICOME.

[1885 B. 377.]

Administration—Solicitor—Trustee—Profit Costs.

A testatrix, after appointing *V.* and *H.*, who was a solicitor and also one of the attesting witnesses to the will, executors and trustees of her will, declared that *H.* should be entitled to charge and to receive payment for all professional business to be transacted by him under the will in the same manner as he might have done if he had not been an executor.

V. proved the will, and a creditor's action was instituted against her. *V.* employed the firm of solicitors in which *H.* was a partner as her solicitors in the action.

H. afterwards proved the will, and was made a Defendant to the action.

When the action came on for further consideration, a question arose whether *H.* was entitled to his profit costs, and an order was made declaring that he was not entitled to claim payment of profit costs by virtue of the declaration in the will, he being one of the attesting witnesses thereto, such declaration to be without prejudice to any of his rights apart from the clause in the will.

The Taxing Master disallowed *H.*'s profit costs of action, on the ground that he was a solicitor-trustee, and as such not entitled to make a profit out of his trust :—

Held, on a summons to review the taxation, that *H.* was entitled to profit costs of action, but that he was not entitled to profit costs for business not done in the action, and that the rule applied as well to costs incurred before as after he proved the will.

Cradock v. *Piper* (1) discussed, and held not to have been overruled.

Broughton v. *Broughton* (2) also discussed.

LYDIA A. BARBER, by her will, dated the 27th of November, 1882, appointed *H. R. Harmer*, who was a solicitor, and her daughter, Mrs. *Vinicome*, executor and executrix of her will, and gave, devised, and bequeathed to them all her real and personal property, upon trust to call in and convert into money and divide the proceeds after payment of her just debts and funeral and testamentary expenses, between her two daughters, Mrs. *Vinicome* and Mrs. *Jickels*, in equal shares. And the testatrix declared that "the said *H. R. Harmer* shall be entitled to charge and to

(1) 1 Mac. & G. 664. (2) 5 D. M. & G. 160.

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receive payment for all professional business to be done by him under this my will, in the same manner as he might have done had he not been an executor."

Harmer was one of the attesting witnesses to the will.

The testatrix died in November, 1884, and on the 21st of January, 1885, probate of the will was granted to the Defendant, Mrs. *Vinicome*, as one of the executors therein named, power being reserved to *Harmer*.

Shortly afterwards this action was commenced by the Plaintiff *Burgess*, on behalf of himself and all other the unsatisfied creditors of *Lydia A. Barber*, against Mrs. *Vinicome*, for the administration of the testatrix's estate, and on the 27th of February, 1885, upon an application under Order xv., r. 1, the Plaintiff obtained judgment, whereby the usual accounts and inquiries and administration were directed.

Mrs. *Vinicome* employed the firm of *Harmer & Ruddock*, of which firm *H. R. Harmer* was a partner, as her solicitors.

On the 11th of November, 1885, probate of Mrs. *Barber's* will was granted to *Harmer*, pursuant to the power reserved to him.

On the 28th of November, 1885, an order to carry on and prosecute the action against the Defendants *Vinicome* and *Harmer*, as the legal personal representatives of the testatrix, was obtained by the Plaintiff.

Upon the action coming on for further consideration on the 18th of January, 1886, the question arose whether *Harmer* was entitled to charge for his professional services as solicitor to the estate, when the Court declared that the Defendant *Harmer* was not entitled to claim payment of professional costs by virtue of the declaration in the testatrix's will contained as being one of the witnesses thereto, but this declaration was without prejudice to any of his rights apart from the clause in the will.

Two bills of costs were carried in for taxation: (1.) The bill of costs of Mrs. *Vinicome* for the whole suit; (2.) The bill of costs of *Harmer* from November, 1885, when he was first made a Defendant.

The Taxing Master disallowed the bill of costs of Mrs. *Vinicome*, except so far as it consisted of payments out of pocket and payments to *London* agents.

Mrs. *Vinicome* carried in objections to the taxation, which objections had reference solely to the costs up to the 11th of November, 1885, and the Taxing Master certified that he disallowed the same, having regard to the declaration contained in the order of the 18th of January, 1886, that the Defendant *Harmer* was not entitled to profit costs, and that he, being a member of the firm of her solicitors, was not entitled to make a profit out of his trust.

The Defendant *Vinicome* thereupon took out a summons to review the taxation which was adjourned into Court.

Romer, Q.C., and *F. H. Colt*, in support of the summons:—

At the time when Mrs. *Vinicome* instructed Messrs. *Harmer & Ruddock* as her solicitors in the action, *Harmer* had not proved the will, and was no party to the action; when he was made a party he appeared by his partner *Ruddock*. The whole of the items in Mrs. *Vinicome's* bill of costs up to the date when *Harmer* proved the will, were incurred by the employment of the firm of *Harmer & Ruddock* while *Harmer* was not an executor of the testatrix's will, nor in any fiduciary position.

The rule that a solicitor being also a trustee and a party to an action, is not entitled to charge costs, except costs out of pocket, does not extend beyond the case of his acting as solicitor for himself alone: *Cradock* v. *Piper* (1).

Ince, Q.C., and *Farwell*, for the Plaintiff:—

Where an executor being a solicitor acts for himself or his co-executor, he can have no profit costs, as it is his duty to protect the estate, and the Court will not allow him to have a pecuniary interest inconsistent with his duty: *Moore* v. *Frowd* (2); *Robinson* v. *Pett* (3); *New* v. *Jones* (4).

The decision in *Cradock* v. *Piper* was not approved of by Lord *Cranworth* in *Broughton* v. *Broughton* (5), nor by Lord *Brougham* in *Manson* v. *Baillie* (6), and it is inconsistent with the

(1) 1 Mac. & G. 664.
(2) 3 My. & Cr. 45.
(3) 3 P. Wms. 249.
(4) 1 Mac. & G. 668, n.
(5) 5 D. M. & G. 160.
(6) 2 Macq. 80.

CHITTY, J. decision of Lord *Langdale* in *Bainbrigge* v. *Blair* (1). [They also referred to *Fraser* v. *Palmer* (2).]

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In re BARBER. BURGES v. VINICOME

Colt, in reply

CHITTY, J.:—

In taxing Mrs. *Vinicome's* costs, the Taxing Master has allowed to her only the costs of her solicitor out of pocket, and she asks the Court by this summons to review the taxation. It is contended on her behalf that she is entitled, not only to the costs out of pocket, but to the ordinary profit costs of her solicitor. The application is made, and rightly made, in Mrs. *Vinicome's* name, but it is really an application in the interest of Mr. *Harmer*, who acted as her solicitor. Mrs. *Vinicome* proved the will, and a creditor's action was instituted against her, and the period that is covered by the bill upon which the question arises is the period up to Mr. *Harmer* being made a defendant in the action. Mr. *Harmer* was made executor in the will, but did not prove until some time had elapsed; and, on his proving, he was, being a co-executor, made a defendant. The Taxing Master in his reasons says that he has allowed only the costs out of pocket, having regard to the declaration contained in the order that the Defendant *Henry Robert Harmer* was not entitled to profit costs. The declaration was not to that effect, but was simply a declaration that by reason of Mr. *Harmer* having attested the testatrix's will he was not by virtue of the declaration, which was contained in her will, entitled to claim profit costs. But the declaration was made expressly without prejudice to any of his rights apart from the claim in the will. The question then is whether the clause in the will being void Mr. *Harmer*—for it is substantially his application—is entitled to the profit costs in question. Now, undoubtedly, a solicitor who is a trustee is not allowed to make a profit out of his trusteeship, and the same rule applies to him in regard to executorship. He stands, in respect of this general principle, in the same position as a broker, commission agent, or the like, who may be appointed trustee or executor, and who may transact some of the business relating to the estate which requires the

(1) 8 Beav. 588. (2) 4 Y. & C. (Ex.) 515.

assistance of either broker, commission agent, or the like; and if the executor or trustee transacts business of that kind for the estate, he is allowed, of course, his costs out of pocket, that is to say, the expenditure, but not anything for his time or trouble. That principle is based upon this consideration, that the Court of Equity will not allow a man to place himself in a position in which his interest and duty are in conflict. If it were not the rule, a trust estate might be heavily burdened by reason of business being done by a trustee or executor employing himself as commission agent for the estate. The difficulty would be in saying in each particular case that the business was not required to be done. But, without considering the grounds of the principle—it is a well-established principle. Consequently, if an executor, being a solicitor, acts solely for himself, or acts for himself and his co-trustee in the business of a trust, he, in the absence of any provision to the contrary in the instrument creating the trust, is not entitled to receive out of the trust-estate profit costs. That is the rule where the business is done not in a suit, but out of Court. The same rule applies where the solicitor does business in Court acting for himself as solicitor where he is plaintiff in an action, and also where he is the defendant. He is allowed, however, to act as solicitor for *cestuis que trust* in an action, because that is not part of the business of the trust properly so-called, and in cases where the *cestuis que trust* obtain, as they sometimes do—in fact generally do—out of the trust estate, their costs, the solicitor who has acted for them is not deprived of his proper bill of costs by reason of his also being a trustee. In *Cradock* v. *Piper* (1) the solicitor acted first for himself, secondly for a co-defendant who was a trustee, and thirdly for the *cestuis que trust;* and Lord *Cottenham* considered the question in regard to his profit costs, and having ascertained by admission that the costs had not been increased by reason of the solicitor himself defending for himself, he allowed the full profit costs in respect of that business in the suit. That is to say, he allowed profit costs to the solicitor, not only in regard to the business transacted for the *cestuis que trust*, but also for the business transacted for the trustee solicitor, and the trustee who was not a solicitor; at the same time,

(1) 1 Mac. & G. 664.

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however, taking care by the order not to allow to the trustee the costs so far as they were increased by his being a party. Now, *Cradock* v. *Piper* (1) was a considered decision of Lord Chancellor *Cottenham*. It is stated at the bar in this case that it has been substantially overruled, and that I am at liberty to depart in consequence of what has taken place from the rule established by Lord *Cottenham*. Lord *Cottenham* considered the principle, and to put his judgment shortly he treated this as an exception on grounds which were satisfactory to himself. I consider that, unless this case has been overruled, I am not at liberty to examine the grounds upon which he proceeded, and to say that his decision was erroneous. Now *Cradock* v. *Piper* was commented upon by the Lord Chancellor *Cranworth* in *Broughton* v. *Broughton* (2), and he said there, that speaking with all deference (not meaning to decide anything upon the point,) that he could not see any distinction between costs incurred in a suit and costs incurred in administering the estate without a suit. But he said the danger might probably be less in the former case than in the latter. But after making that observation he proceeds to mention *Cradock* v. *Piper*, and says, in that case, however, the general rule might have been probably safely relaxed, and presently he goes on to state that if the circumstances of the case before him had brought it within the range of that decision, he should have felt himself bound to follow Lord *Cottenham's* decision. The circumstances in *Broughton* v. *Broughton* were such that Lord *Cranworth* considered that they did not bring that case within the range of the decision in *Cradock* v. *Piper*.

The result, therefore, is that Lord *Cranworth* not only did not purport to overrule the decision in *Cradock* v. *Piper*, but said that he should follow it.

There were some observations also made by the same Lord Chancellor in a previous case of *Manson* v. *Baillie* (3), and his observations in that case, as well as the observations of Lord *Brougham*, were cited to him in *Broughton* v. *Broughton*, and it is sufficient to say in regard to *Manson* v. *Baillie* that Lord *Cranworth*, as appears from what is stated in the subsequent case

(1) 1 Mac. & G. 664.

(2) 5 D. M. & G. 160.

(3) 2 Macq. 80.

of *Broughton* v. *Broughton* (1), merely threw out observations upon the authority of *Cradock* v. *Piper* (2), and did not purport to overrule it. A similar observation may be made upon the remarks that fell from Lord *Brougham*.

The result, therefore, is that, on the reported decisions, *Cradock* v. *Piper* stands unimpeached. The effect of *Cradock* v. *Piper* was undoubtedly to overrule the previous decision of Lord *Langdale* in *Bainbrigge* v. *Blair* (3).

Then it is suggested at the bar that *Cradock* v. *Piper* has not been followed in the Taxing Master's office. I thought it right to consult the Taxing Masters on this point of practice, and I have a report from the senior Taxing Master, after consulting two other Taxing Masters, to the effect that these three Taxing Masters agree that *Cradock* v. *Piper* is always acted upon. The result, therefore, is that Lord *Cottenham's* decision that was pronounced in 1850 has never been overruled. A subsequent Lord Chancellor stated that he should follow it, and it has always been followed in practice in the Taxing Master's office. Unquestionably, therefore, I am bound by that judgment in *Cradock* v. *Piper*, and ought to follow it, as I intend to do.

Now, the exact point in this case is in regard to the costs of Mrs. *Vinicome* when she was sole Defendant in the action. Consequently there is no such question as there was in *Cradock* v. *Piper* as to the costs being increased, because Mr. *Harmer* was not then a party to the action. The result is that, so far as the bill of costs relates to the action, Mrs. *Vinicome*, or, in substance Mr. *Harmer*, is entitled to profit costs being costs of the action. To that extent there is an error in the certificate. A small portion of the costs relates to costs not in the action. The general rule of law is that the executor derives his title from the will and that the probate is merely the authenticating evidence of his title, and the probate is said to have relation to the time of the testator's death. According to that principle, although some years elapsed after the testatrix's death before Mr. *Harmer* proved, he was, by relation back, executor from the testatrix's death. It was pointed out by Lord Chancellor *Talbot* in *Robinson* v. *Pett* (4),

(1) 5 D. M. & G. 160.
(2) 1 Mac. & G. 664.
(3) 8 Beav. 588.
(4) 3 P. Wms. 249.

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that if any distinction is to be made with regard to the executor, where he is a solicitor, who did not prove at first, but who should prove afterwards, it would be an art practised by solicitors to get themselves out of the rule which he took to be a reasonable one and to have long prevailed. In other words, solicitors might be tempted to delay the probate for one or two years, or some sufficient time, leaving all business to be transacted by the other executor and act as solicitor, during that period, and then say: "I was not executor, because I did not become executor until the probate." I see, therefore, no ground, having regard to the decision in *Robinson* v. *Pett* (1) and the general principle, for saying that the general rule that the probate relates back to death should not apply to the executors for the purpose of the question before me. Therefore I think that the executor-solicitor—in this case, that is Mr. *Harmer*—is not entitled to his profit costs for so much of the business comprised in the bill as was business not done in the action.

The matter, therefore, will go back, if necessary, to the Taxing Master to review his certificate, having regard to the grounds I have mentioned.

Solicitors: *Aldridge, Thorn, & Morris; Pritchard, Englefield, & Co.*

(1) 3 P. Wms. 249.

G. M.

NORTH, J.
1886
Oct. 29.

In re GREY'S SETTLEMENTS. ACASON *v.* GREENWOOD.

[1886 G. 1539.]

Will—Construction—Married Woman—Restraint on Alienation.

A testator having a general power of appointment over a settled fund, appointed that a sum of £1500 should be raised and paid to his daughter absolutely for her separate use with restraint on anticipation, and after appointing another specific sum, appointed one-fourth of the residue upon trust for the same daughter absolutely for her separate use with restraint on anticipation:—

Held, that the daughter, who was married, was not entitled to payment of the one-fourth share of the residue.

THE will of *Harry Hanslip Laurence*, deceased, after reciting that he was possessed of general powers of appointment among his children by his late wife, under two settlements made by *William Patrick Grey*, and that he had four such children, contained the following appointments:—

"Now I do hereby in exercise and execution of the power and powers by the hereinbefore recited indentures of settlement and each of them direct and appoint that the sum of £1500, part of the money or investments subject to such power or powers, shall be raised (clear of expenses and succession duty), and paid to my daughter *Florence Ann Laurence* absolutely, for her sole and separate use, independently of marital control and without power of anticipation during any coverture: And I direct and appoint that the sum of £500, further part of the same money or investments, shall be raised (clear of expenses and succession duty) and paid to my daughter *Susanna Emma*, the wife of *James Edgar Marshall*, absolutely. And I direct and appoint that all and every the residue of the same money or investments (hereinafter referred to as the said residue) shall go and be held upon the following trusts (namely): As to one-fourth share thereof upon trust for my daughter *Florence Ann Laurence* absolutely, for her sole and separate use, independently of marital control and without power of anticipation during any coverture." The

NORTH, J. 1886 *In re* GREY'S SETTLEMENTS. ACASON *v.* GREENWOOD.

testator's daughter, *Florence Ann*, was now the wife of *William Henry Greenwood*.

This was an originating summons taken out by the trustees of the above-mentioned settlements to have it determined whether Mrs. *Greenwood* was entitled to have the capital of the fourth share of the residue appointed in her favour under the will of *Harry Hanslip Laurence* paid to her on her separate receipt. No question was raised by the summons as to the £1500.

Sladen, for Mrs. *Greenwood*:—

The case of *In re Bown* (1) establishes the proposition that where an instrument gives the *corpus* of a fund absolutely and immediately to a married woman for her separate use, and contains subsequent words in restraint of anticipation, such words are inoperative unless there is an intention manifested that the fund is to be kept intact and the income only paid to the married woman. This proposition is to be deduced from the judgments of Lords Justices *Cotton* and *Lindley* (2). *Baggett* v. *Meux* (3) shews how such intention may be gathered; there is nothing in the testator's will in this case from which such intention can be inferred.

In the recent case *In re Currey* (4), the *ratio decidendi* of *In re Bown* seems to have been misunderstood; while the decisions in *In re Croughton's Trusts* (5), and *In re Clarke's Trusts* (6) are in favour of my contention, because the supposed distinction between income-bearing and non-income-bearing funds has been destroyed by the Court of Appeal in *In re Bown*.

Vaughan Hawkins, for the trustees of the settlement.

Bramley, for a Defendant.

NORTH, J.:—

It appears to me that this share cannot be paid over at once, because the direction is that it is to be held upon trust for the

(1) 27 Ch. D. 411.
(2) 27 Ch. D. 422, 423, 424.
(3) 1 Coll. 138, 139.
(4) 32 Ch. D. 361.
(5) 8 Ch. D. 460.
(6) 21 Ch. D. 748.

separate use of the testator's daughter without power of anticipation. That seems to me a direction to every word of which I must give effect if I can. It is suggested that the words "without power of anticipation" are to be neglected because they are antagonistic to another part of the direction. I cannot concur in that argument. The direction is that the share is to be held in trust for the testator's daughter; that means that the trustees are to retain the share of the funds during the time she is under coverture, and that the income only as it accrues due is to be paid to her for her separate use. There is a marked contrast between the £1500 which is to be raised clear of expenses and duty and paid to her, and the one-fourth of the residue of the moneys and investments which is to be held in trust for her.

Solicitor for Mrs. *Greenwood: S. F. Langham*, agent for *F. A. Langham, Hastings.*

Solicitors for the Trustees: *Wright & Pilley.*

D. P.

C. A.
1886
KAY, J.
Oct. 28.
C. A.
Nov. 10.

NEWPORT (MON.) SLIPWAY DRY DOCK AND ENGINEERING COMPANY *v.* PAYNTER.

[1886 N. 328.]

Practice—Particulars—Alleged False Entries.

A company which had bought the business of the Defendants, and employed them to manage it, brought an action against them for an account of what was due from them under a guarantee that the profits should amount to a certain yearly sum. The statement of claim alleged that the Defendants had made false entries in the books for the purpose of making the working expenses appear less than they had been, and so relieving themselves of liability under the guarantee. The Defendants obtained an order for the Plaintiffs to furnish particulars of the false entries alleged. The Plaintiffs set out a list of the items complained of, transcribed from the books, with references to the parts of the books where they were found. The Defendants applied for further and better particulars. *Kay*, J., refused the application:—

Held, on appeal, that as an entry might be wrong in different ways, the mere specification of the entries complained of did not give the Defendants sufficient information of the nature of the case they had to meet, and that the Plaintiffs must state shortly as to each item the general nature of the objection they made to it.

THE Plaintiff company was formed in August, 1883, for the purpose of purchasing the business of engineers and ship repairers carried on by the Defendants *Paynter & Summers*. The agreement of purchase provided that *Paynter* should be the general manager of the company for two years from the 1st of October, 1883, and *Summers* the manager of the engineering department for the same term, and *Paynter & Summers* guaranteed that the net profits during that period would be sufficient to pay a dividend of not less than £7 10*s.* per cent. per annum on the paid-up capital of the company for the time being, and in the event of their not being sufficient the Defendants were to make up the deficiency.

The company in 1886 commenced this action against *Paynter & Summers* alleging that the Defendants had induced the company to enter into the purchase agreement by fraud and misrepresentation. The statement of claim further alleged that at

the general meetings in December, 1884, and December, 1885, balance sheets were made out from the books of the company, which were kept by the Defendants, shewing profits sufficient to warrant the payment of dividends at the rate of £7 10*s.*, and that such dividends were accordingly declared and paid. By par. 14 it was alleged to the effect that after the meeting of December, 1885, the directors had received information as to the books having been improperly kept, which led them to believe that no profits had been made in 1884 and 1885. That they thereupon investigated the company's affairs and discovered as follows: "(*a.*) That the Defendants, or one of them, had systematically from the time when the Plaintiff company commenced business caused false entries to be made in the books of the Plaintiff company. (*b.*) That such false entries were made more particularly with respect to the construction-account of the Plaintiff company. (*c.*) That such false entries were made for the purpose of causing it to appear that the Plaintiff company's working expenses had not been so large as they had been, and that large profits had been made which in fact had not been made." The statement of claim went on to allege that the Defendants had made these wrong entries for the purpose of relieving themselves from their liability under the guarantee, and the company claimed damages for the alleged fraud and misrepresentation whereby it had been induced to enter into the agreement for purchase, and to have all necessary inquiries and accounts made and taken for the purpose of ascertaining what was due from the Defendants to the company under their guarantee.

On the 20th of April, 1886, the Defendants took out a summons "for an account in writing of the particulars of the improper, wrong, and fraudulent and false entries and of the misrepresentations alleged in par. 14, sub-pars. (*a*), (*b*), and (*c*) of the statement of claim, and in pars. 2 and 8, as referred to in par. 16 of the same statement of claim." Pars. 2, 8, and 16, referred to the misrepresentations alleged to have been made to induce the Plaintiffs to purchase, and no point as to them arose on the present occasion.

On the 3rd of May an order was made in Chambers "that the Plaintiffs do within ten days deliver to the Applicant or his

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solicitors further particulars in writing as asked with reference to par. 14 of the statement of claim."

The Plaintiffs, in compliance with this order, delivered to the Defendants a document headed, "Further particulars with dates and items of the alleged false entries in the books of the Plaintiffs referred to in par. 14 of the statement of claim." The body consisted of some hundreds of entries taken from the books with dates, items, and references to the books. The first entry being:

			£	s.	d.
"To 1 piece pitch pine	5′ 0″ × 3′ 0″	7 ft. 1/6	0	10	6."
1 „ „	6′ 0″ × 10″				

Paynter took out a summons for further and better particulars. This summons was heard by Mr. Justice *Kay* in Chambers, and dismissed with costs. *Paynter* gave notice of motion to discharge this order, and the motion was heard by Mr. Justice *Kay* on the 28th of October, 1886.

Swinfen Eady, for the motion:—

The Plaintiffs enumerating entries in the books which they alleged to be false is not sufficient; they should specify in what respect the entries are false. It is part of their case that false entries were made in order that it should appear that the working expenses were less than they really were, and that large profits had been made which had not in fact been made, and they ought to be required to set forth their allegations more specifically, whether the whole or part of the works charged for were not done, or whether an excessive price was charged for labour or for materials.

[KAY, J.:—If an excessive price had been charged that would not necessarily be a false entry.]

Unless the information which is asked for be given the Defendants cannot be prepared at the trial with their evidence. It will be necessary for them to bring up from *Wales* a large number of witnesses to give evidence upon a variety of facts, and in the result their evidence in regard to those facts might prove to be not relevant.

[Rules of the Supreme Court, 1883, Order XIX., rules 6 and 7, were referred to.]

Seward Brice, and *R. Woodfall*, for the Plaintiffs, were not called upon.

KAY, J.:—

I do not think that I ought to accede to this application. In all these cases the Court has to hold an even hand between the litigating parties; so as on the one side not to prevent the Plaintiffs' action from being duly prosecuted, and on the other not to put the Defendants at a disadvantage when the case comes on for trial, by not knowing what case they have to meet by evidence. This is a very simple matter indeed. The Plaintiffs, it appears, purchased from the Defendants a certain business. They, a company limited, had employed the Defendants to carry on the business for a time after the purchase; and they have made charges that the Defendants, who were in their employ, kept the books improperly, and made entries fraudulently therein; the fraud being that they made entries which justified the payment of a dividend, whereas in fact no such dividend had been really earned. That is the particular allegation. The Plaintiffs say that they caused an investigation to be made, and that the result was that on looking into the books they discovered substantially that the Defendants and their agents had systematically from the time when the company made their purchase caused false entries to be made in their books, and that the false entries were made more particularly in reference to the construction of the works; and for the purpose of making it appear that the works and expenses were not so large as they had in fact been. The allegation in the statement of claim is simply a charge that in the books the Defendants had of design fraudulently made false entries. There is no doubt what the meaning of that is. "False entry" means an entry which is either totally fictitious, or fictitious to some extent. Particulars of the false entries were required and given, and applications were made for further and better particulars. I understand that the Judge has twice ordered further and better particulars to be delivered, and that the second set of particulars was delivered under the latter order, and I am told that in that set of particulars the entries in the books, *i.e.*, the entries which are alleged to be false, are given distinctly by reference to the

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folio on which they are to be found. They are of this kind, "One piece of pitch pine, dimensions given, and price stated, 10*s.* 6*d.*," and so on, through a number of items which are very similar, each of which is alleged to be a false entry. The Defendants say that they want to know in what respect the entries are false, whether because the articles therein described were never delivered at all, or because they were not worth the money paid for them. Now that argument is strained, as it seems to me, in some respects. It is entirely outside the question. The allegation to which the Plaintiffs' pleading is addressed is that the entry was false. It is not that if money was paid it was too much to pay. That would not make the entry false. It is that the entry was false in that the money was not in fact paid either in whole or in part, and the Defendants' counsel was obliged to admit that if I were to order further and better particulars, and the only further and better particulars were in this form, "each of these entries is untrue in whole or in part," that would be all that they could require. The Plaintiffs will not be able to support their pleading unless they shew by evidence at the trial that each of the entries is untrue either in whole or in part. It seems to me that I cannot fairly relieve the Defendants from any trouble at the trial by now ordering further and better particulars. It appears to me that the pleading cannot be supported at the trial unless it be shewn that the entries are false either in whole or in part; and whatever further and better particulars of that kind should be given, the Defendants would have to be prepared at the trial to support these entries, because if it be proved that they are either in whole or in part false, the Plaintiffs may possibly have made out their case, while, on the other hand, if that be not proved, they must fail. The complaint is, not that the payments were wrong or improper, but that the entries of the payments in the books are false, which is very intelligible, and I think that the Defendants are sufficiently aware of the case they have to meet when they have each particular item pointed out to them. I therefore refuse the motion with costs.

T. F. M.

C. A. *Paynter* appealed, and the appeal was heard on the 10th of November, 1886.

Swinfen Eady, for the Appellant:—

These particulars give the Defendants no idea of the case they have to meet. An entry may be wrong in various ways, it may be entered under a wrong date, or may be wrong in amount, or may be altogether fictitious. Is the case of the Plaintiffs that work was not done at all, or that it was put down to the wrong account, or that a wrong amount was put down? We cannot defend ourselves without some information as to the nature of the case made against us.

W. Pearson, Q.C., and *Seward Brice*, for the Plaintiffs:—

We have given full particulars of the entries we allege to be false, and that is all the Defendants can require. It is a mere question of evidence how an entry is false. If it is true it is a simple thing for the Defendants to prove it. We should be obliged to disclose our evidence if we specified why the entries were untrue.

Swinfen Eady, in reply:—

We ask for nothing which would lead to any disclosure of evidence. We only ask for the general nature of the objection taken to each item.

COTTON, L.J.:—

The question is whether the Plaintiffs have complied with the order for delivery of particulars? The object of particulars is to enable the party calling for them to know what case he has to meet. The Plaintiffs have furnished a long list of entries which they allege to be false, but the mere statement that they are false does not inform the Defendants what case they have to meet. An entry may be false in various ways—for instance, it may be wrong in amount, or it may be an entry of a transaction which never took place at all. Take the first item, which relates to pitch pine bought, there is nothing to shew whether the Plaintiffs allege that the pitch pine was never bought at all, or that the price and quantity are wrong. I do not say that in every case it is necessary to do more than give the items, in some cases the mere reference to an entry gives all the information wanted, as for instance,

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if the case in the pleadings was that certain things charged for were never done at all, a mere reference to the items would be enough. It is argued that to require the information now asked for is to require the Plaintiffs to shew their evidence. That is not so, we only require that the Plaintiffs should state in a general way the nature of their objections to the several items, so as to give the Defendants fair notice of the case they are called upon to meet. The Plaintiffs must state very shortly what is the nature of the impropriety, falsehood, or fraud alleged against each item, and they are to be at liberty to withdraw any items as to which they cannot make such statement.

FRY, L.J.:—

The only question is whether the Plaintiffs have obeyed the order which directs them to furnish further particulars "as asked," with reference to par. 14 of the statement of claim. What was asked was "an account in writing of the improper, wrong, and fraudulent and false entries alleged in par. 14 of the statement of claim." In my judgment in a case of this sort reasonable particulars are not given unless some idea is given of the nature of the inaccuracy alleged against the entries. Without laying down any rule to apply to all cases, I think it plain that in this case the Defendants have not had sufficient information given them. The object of the order was to let them know what they had to meet, and I think that it has not been substantially complied with.

Solicitors for Plaintiffs: *Gibbs & White*, agents for *Joseph Gibbs, Newport (Mon.)*.

Solicitors for Defendants: *Stocken & Jupp*, agents for *Williams & Co., Newport (Mon.)*.

H. C. J.

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[1883 E. 1202.]

Oct. 29, 30; *Nov.* 1, 2, 12.

Banker—Deposit by Money-Dealer of his Customers' Securities—Custom of Trade—Estoppel—Foreign Bonds payable to Bearer—Negotiable Securities—Purchase without Notice.

S. gave to *E.*, with whom he was associated in a financial adventure, certificates of stock in a foreign railway, of which he executed transfers in blank, and bonds of foreign companies, for the purpose of raising a loan.

Some of the foreign bonds were made payable to bearer, and in others the name of the obligee was left blank, the bonds being transferable, after the name had been filled in, by entry in the company's books. There was evidence that both these classes of bonds were treated in the city of *London* as negotiable securities transferable by delivery.

E., with the acquiescence of *S.*, gave these securities to *M.*, who was a money-dealer in *London*, for the purpose of his raising money on them from joint stock banks. *M.* obtained an advance from these banks by depositing the securities, together with the securities of other customers, with them, having first filled in the names of the nominees of the banks in the transfers of the railway stock.

M. soon after became bankrupt, and the banks claimed to hold the stock and bonds as security for all the debt due from him to them. There was evidence that it was the custom for banks dealing with money-dealers in *London* to advance money to them on the deposit of the securities of the money-dealers' customers *en bloc*, without regard to the interest of the particular customers:—

Held, that although there was no proof of a general custom of trade in the city of *London* that money-dealers could pledge their customers' securities *en bloc* for their own debts, there was sufficient evidence of such a course of dealing between the banks and *M.*, and that *E.* had notice of such course of dealing;

That although *S.* did not authorize *E.* to deal with the securities as he pleased, but only by way of mortgage, yet as he had executed the transfers in blank and had handed to *E.* bonds transferable by delivery, he was estopped from objecting to the legal title of the banks:

That the bonds, although not strictly negotiable securities, were to be treated as such between the parties, on the authority of *Goodwin* v. *Robarts* (1);

That the banks, having the legal title in the stock and having obtained the bonds in their ordinary course of dealing with *M.* without any reason for suspecting that he was exceeding his authority, were purchasers for value without notice, and were entitled to hold them as security for all the debt due from him.

THIS was an appeal from a decision of Mr. Justice *Pearson*.

In November, 1882, there was an arrangement between the

(1) 1 App. Cas. 476.

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Plaintiffs, *Edward Easton* and *Henry North*, Earl of *Sheffield*, under which Lord *Sheffield* was to participate in the profits of certain land operations in *Egypt* in which *Easton* was engaged. *Easton* having required an advance to carry on these operations, Lord *Sheffield* gave to *Easton* certificates and transfers of the following stocks to enable him to raise £20,000 for this purpose; namely, £21,099 ordinary stock of the *Grand Trunk Railway of Canada*, £10,598 2nd Preference Stock, and £14,500 3rd Preference Stock of the same railway.

In all these transfers blanks were left for the names of the transferees. *Easton* had informed Lord *Sheffield* that he intended to get the money from *Lewin Mozley*, a money-dealer, who would obtain it from various banks.

On the 27th of November, 1882, *Easton* wrote to Lord *Sheffield* a letter, in which he said:—

"In accordance with our conversation on Saturday last I now beg to write you particulars of the way in which I propose you should enable me to raise the £20,000 you so kindly and generously said you would let me have if you could manage it. Mr. *Lewin Mozley*, of &c. (whose business is to carry out such transactions on a very large scale in conjunction with some of the principal joint stock banks), will advance us that sum (£20,000) for six months on the deposit of *Grand Trunk* Preference Stock (2nd and 3rd) of the present value of £26,000 or £27,000, and will pay the dividends as they fall due into your account at *Coutts'*. He will require blank transfers of the stock signed by you and an order on *Coutts'* to deliver to the holder of the transfer the stock certificates.

"Taking 2nd Preference at 99 and 3rd at 58, it will require £12,000 Stock of the former and £26,000 of the latter to cover the loan. On my part I will undertake to pay you on the 1st June next £500 for interest, being at the rate of 5 per cent. per annum, and to retransfer to you the like amount of stock on or before that date, giving as security the assignment of policies on my life to the extent of £20,000. This will give you an extra 5 per cent. on your investments, besides leaving them to increase in value."

On the 28th of November, 1882, *Easton* wrote again to Lord *Sheffield*:—

"I hereby acknowledge the receipt of two transfers of £10,598 2nd Preference Stock and of £21,099 ordinary stock of the *Grand Trunk Railway of Canada*, to be followed by a transfer of about £14,500 3rd Preference Stock in the same undertaking, all of which I am authorized to pledge for a period of six months ending 31st May, 1883; and I undertake that the said stock shall be retransferred to you on or before the 1st June, 1883, at which date I am to pay you £600 as interest on the loan of the said stock. It is understood that the stock shall receive the full benefit of any rise in its value during that period as if the stock had not been transferred. I also undertake that the dividends shall be paid to your account at *Coutts'* as they fall due."

Easton obtained the required advance of £20,000 from *Mozley* and deposited with him the certificates of stock and transfers in blank which he had received from Lord *Sheffield*.

On the 6th of April, 1883, the market value of the *Grand Trunk* Stock having fallen, *Mozley* required additional security, and Lord *Sheffield* accordingly sent *Easton* certificates and blank transfers for £8000 more 3rd Preference shares, which were forwarded by him to *Mozley*.

The memorandum given to *Mozley* by *Easton* on the occasion of the loan was in the following form:—

"In consideration of your advancing to me the sum of £20,000, repayable at the end of May, 1883, with interest at the rate of 4½ per cent. per annum, I herewith deposit with you the undermentioned securities value £23,040, to be held by you as collateral security for the due repayment of the said loan and the interest thereon. It is understood and agreed that the current market price of the securities held by you shall at all times during the continuance of the loan represent a value exceeding by 20 per cent. the amount of the loan then outstanding, and if at any time it be otherwise I engage without notice from you to provide you with such additional security to your satisfaction or to pay off so much of the loan as shall restore the said margin, and in

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the event of my failing to do so, or of the loan remaining unpaid after it becomes due, I hereby authorize you to realize the securities as you may deem fit for the purpose of repaying yourself the amount due to you, and I undertake to pay you any deficiency that may arise between the net proceeds of the securities and the amount due to you as well on account of the sum advanced as for interest thereon and all charges and expenses of realization.

"These and any additional securities are to extend to any sums of money in which I may be indebted to you, while the securities or any of them remain in you hands.

"*E. Easton.*"

On the 14th of April *Easton* required a further advance of £6000 from *Mozley*, and Lord *Sheffield* sent him bonds of the *Delaware and Hudson Canal Company* for $19,000 and bonds of the *Baltimore and Potomac Railway* for $16,000. These were also forwarded by *Easton* to *Mozley*.

Mozley deposited all these securities, together with the securities of others of his customers, with three joint stock banks, namely, the *London Joint Stock Bank*, the *Capital and Counties Bank*, and the *Royal Bank of Scotland*. The blank transfers of stock were filled in with the names of the trustees or public officers of the banks and duly registered.

On the 10th of May, 1883, *Mozley* presented a petition for liquidation, and a trustee was appointed of his estates.

At the commencement of the liquidation the *London Joint Stock Bank* had in their possession £21,099, ordinary stock, £5,000 2nd Preference Stock, and £22,500 3rd Preference Stock of the *Grand Trunk of Canada Railway*. The *Capital and Counties Bank* had $17,000 bonds of the *Delaware and Hudson Canal*, and $16,000 bonds of the *Baltimore and Potomac Railway*, and the *Royal Bank of Scotland* had £5,598 2nd Preference Stock of the *Trunk Railway of Canada*, and $2,000 bonds of the *Delaware and Hudson Canal*.

The *Royal Bank of Scotland* did not deal directly with *Lewin Mozley*, but received the securities from his cousin *Frederick Mozley*, who carried on business on his own account.

The *Baltimore and Potomac Railway* bonds were made payable

to bearer, but they might be inscribed in the books of the company in the name of a particular person, in which case they must be transferred to a purchaser by entry in the books.

The *Delaware and Hudson Canal* bonds had blanks for the name of the holder, and the company was thereby bound to pay to the legal holder. There was an indorsement on the bonds to the effect that they might be registered in the owner's name in the company's books, after which no transfer should be valid unless made in the company's books by the registered owner; but the same might be discharged from registry by being transferred to bearer, after which they might be transferred by delivery. But in fact no holder's name was ever inserted in any of these bonds.

There was evidence that in the city of *London* both these classes of bonds were treated as transferable by delivery from hand to hand; but there was no evidence as to the American law on the subject.

The memorandum of deposit given to the *London Joint Stock Bank* on depositing the securities was as follows:—

"April 27, 1883.

"In consideration of your advancing to me the sum of £141,500 on loan until the 11th day of May next, I deposit with you as collateral security for the due repayment of the said loan and interest at the rate of $3\frac{3}{4}$ per cent. per annum, the several securities following, namely, as per Loan Security Book; the present market value of which is £157,000. This value during the continuance of the loan I engage to keep up, in the event of the market price declining, by depositing other approved security or by paying off such part of the loan as you may require even before the 11th day of May, and failing doing so or in the event of the loan not being repaid when due, I authorize you forthwith or at any time afterwards, although the time for repayment of the loan may not have arrived, to realize such securities or any part thereof, on any substituted securities which may be in your hands; I hereby engaging on request to transfer such securities or any part thereof to any two or more of your trustees, who are also to possess full power to sell the same to repay the said loan or any part thereof with interest and expenses.

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"This security is to extend to any other sum or sums of money as to which I may at any time be indebted or liable to you either on individual or partnership account, while the securities or any of them or the proceeds thereof remain in your hands.

"*Lewin Mozley.*"

The note given by *Mozley* to the *Capital and Counties Bank* was as follows:—

"*London*, April 13, 1883.

"Borrowed from the *Capital and Counties Bank, Limited*, the sum of £100,000 on the security noted on the back hereof to be repaid to the said bank with interest at the rate of 4½ per cent. on £12,000, £3½ per cent. on £88,000 per annum, on the 27th April, 1883. On my failing to repay the same on that date, or if during the currency of the loan the securities do not represent a value exceeding by 10 per cent. the amount of the sum borrowed, I hereby authorize the said bank to sell the securities, and I engage to pay them any deficiency after such realization.

"*Lewin Mozley.*"

The memorandum given to the *Royal Bank of Scotland* was as follows:—

"*London*, Nov. 30, 1882.

"In consideration of your advancing to me the sum of seventy thousand pounds repayable on the account mid. December with interest at the rate of 5 per cent. per annum, I herewith deposit with you the undermentioned securities value £78,355 to be held by you as collateral security for the due repayment of the said loan and the interest thereon.

"It is understood and agreed that the current market price of the securities held by you shall at all times during the continuance of the loan represent a value exceeding by 10 per cent. the amount of the loan then outstanding, and if at any time it be otherwise, I engage without notice from you to provide you with such additional security to your satisfaction or to pay off as much of the loan as shall restore the said margin, and in the event of my failing to do so or of the loan remaining unpaid after it becomes due, I hereby authorize you to realize

the securities as you may deem fit for the purpose of repaying yourselves the amount due to you, and I undertake to pay you any deficiency that may arise between the net proceeds of the securities and the amount due to you as well on account of the sum advanced as for interest thereon and all charges and expenses of realization.

"These and any substituted or additional securities are to extend to any sums of money in which we may be indebted to you while the securities or any of them remain in your hands.

"*Frederick Mozley.*"

After the date of *L. Mozley's* liquidation the banks had sold the various securities in their hands.

The Plaintiffs claimed a declaration that they were entitled at the date of *Mozley's* liquidation to redeem the stocks and bonds advanced by Lord *Sheffield* on payment of the sums due from the Plaintiffs to *Mozley*, and they claimed damages for the wrongful sale of the securities by the Defendants.

The Plaintiffs and *Mozley* were examined *vivâ voce* in support of the Plaintiffs' case. On behalf of the Defendants the security clerks of the three banks were examined, and deposed that they believed that *Mozley* had full power to pledge the securities. They stated that the universal practice of the banks in the city of *London* in advancing money to money-dealers was that the money-dealers deposited a number of securities belonging to their customers *en bloc*, to cover the whole loan, and engaged to keep them up, by exchanging or providing additional securities, to a certain margin above the loan: and that the money-dealers were in the habit of borrowing those which they might require on settling days and restoring them, or their equivalents, in the evening. This evidence was corroborated by brokers and other persons engaged in the business of money dealing in *London*.

The trial came on before Mr. Justice *Pearson* on the 2nd of February, 1886, and occupied several days.

Mr. Justice *Pearson* in giving judgment said that he had come to the conclusion, on the evidence before him, that Lord *Sheffield* entrusted the securities to *Easton* to deal with them as if they were his own, that as between Lord *Sheffield* and *Easton*, *Easton*

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was the debtor to Lord *Sheffield*, and that *Easton* might raise the money upon the securities, and provided he kept his terms with Lord *Sheffield*, it was a matter of indifference to Lord *Sheffield* what terms *Easton* made with the person from whom he obtained the money. He therefore held that *Easton* must be treated, not as Lord *Sheffield's* agent, but as an ordinary principal in obtaining a loan from *Mozley*, and that Lord *Sheffield* could not have greater rights than *Easton* had. His Lordship also held that *Easton* well knew the method in which *Mozley* conducted his business, and that he intended to deposit the securities with different banks with which he had many arrangements; and that when so deposited they would become a security for the entire amount of *Mozley's* indebtedness from time to time to those banks.

In those circumstances his Lordship thought that no question could arise as to the existence or lawfulness of the usage which was stated to exist in the city of *London*, the borrower himself having consented to *Mozley*, from whom he borrowed, using the securities in this way; and that being so, the banks had a good title from him. His Lordship, therefore, dismissed the action with costs, but abstained from giving any opinion upon the alleged usage.

From this judgment the Plaintiffs appealed.

Rigby, Q.C., and *Grosvenor Woods*, for the Appellants:—

The evidence does not prove that there is any such custom in the city of *London* as alleged, that money-dealers can deposit their customers' securities *en bloc* as security for their own debts. Such a custom would be dishonest and invalid. Moreover, it has not been properly pleaded in the statements of defence put in by the Defendants.

In the absence of such a custom the Defendants must shew that Lord *Sheffield* authorized *Easton* to deal with the stock as if it was his own. This was the view which Mr. Justice *Pearson* took, but it is not borne out by the evidence. The letters which passed between them shew that he only authorized him to pledge them, and there is no evidence that he contemplated that *Easton* would either sell them himself or put it in the power of

any other persons to sell them. It is contended that the fact of Lord *Sheffield* having executed blank transfers of the stock, and having deposited the foreign bonds with *Easton*, gave him implied authority to deal with them as he pleased; but the same would apply to all goods deposited with a pledgee, and it cannot be contended that he has an absolute control over them. A mortgagee can pass to a sub-mortgagee his own interest, and no more: *France* v. *Clark* (1). Moreover the foreign railway bonds are not negotiable in the same way as bank notes; although they are transferable by delivery, they are affected by the equities of the previous holders. In this they differ from the securities in *Goodwin* v. *Robarts* (2). The Defendants claim as purchasers of these securities for value without notice of the Plaintiffs' title. We deny that they had no notice. They knew that *Mozley* was a money-lender, and they knew that these securities were the securities of his customers, and that if he had power to deal with them he had only a limited power. They were therefore bound to inquire as to the extent of that power. In the ordinary cases of purchasers claiming as purchasers without notice, they always suppose that the vendors are the owners: if they know that they are selling under a power, they are bound to inquire as to the extent of the power.

Cookson, Q.C., and *Rawlins*, for the *London Joint Stock Bank*, were desired by the Court to address themselves to the extent of *Easton's* authority.

There is no allegation in the pleadings that he exceeded it. But supposing he did, a man who allows another to hold himself out as absolute owner of property cannot repudiate that man's dealings with it. *Roffe* v. *Roscoe* (C. A. June 13, 1879) is similar to the present case. The circumstances of the case are wholly different from those of *France* v. *Clark*, and the principle laid down in *Tayler* v. *Great Indian Peninsula Railway Company* (3) applies. *Rumball* v. *Metropolitan Bank* (4) is in our favour, *Easton* having been placed in a position to represent himself as entitled to deal with the securities as he pleased. With respect to the

(1) 26 Ch. D. 257.
(2) 1 App. Cas. 476.
(3) 4 De G. & J. 559, 574.
(4) 2 Q. B. D. 194.

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usage of banks in their dealings with money-lenders, we do not rely on it as a custom binding upon all men, but as a course of dealing well known to all the parties concerned.

Napier Higgins, Q.C., and *F. Thompson*, for the *Capital and Counties Bank*:—

We hold what are in fact negotiable securities, there being a distinct admission that they pass by delivery. We therefore acquired a good title independently of the question of the authority of *Mozley*; *Goodwin* v. *Robarts* (1); there being nothing to fix us with notice that he was committing a breach of duty. Nothing goes beyond this, that we knew that *Mozley* had securities to borrow money upon, and this transaction being according to the ordinary course of business, there was nothing to raise suspicion that *Mozley* was doing anything that he had not a right to do: *Gorgier* v. *Mieville* (2); *Raphael* v. *Bank of England* (3); *Haynes* v. *Foster* (4); *Foster* v. *Pearson* (5); *Leake* on Contracts (6). If, however, we are not held entitled on the footing of the documents being negotiable securities, we say that Lord *Sheffield* gave such an appearance of authority to *Mozley* that he cannot complain of his acts. We had in fact no notice of anything relating to Lord *Sheffield* except that he had been the transferor. He is estopped from objecting to the title of those who purchased from *Easton* or *Mozley*.

Cozens-Hardy, Q.C., and *Stokes*, for the *Royal Bank of Scotland*:—

Our position differs somewhat from that of the other Defendants, inasmuch as we did not deal with *Lewin Mozley*, but with *Frederick Mozley*. There is, therefore, another link in the chain; and we had no reason to suspect that he had no authority to pledge the securities. Though we do not rely on a legal custom in the city of *London* binding on all dealing there, yet there is sufficient evidence of the common usage of bankers in their

(1) 1 App. Cas. 476.
(2) 3 B. & C. 45.
(3) 17 C. B. 161.
(4) 2 C. & M. 237.
(5) 1 C. M. & R. 849.
(6) Page 1167.

dealings with money-lenders, and of the knowledge of the Plaintiffs of such mode of dealing to bind them.

Cave, for the Defendant *Young*, the trustee in *Mozley's* bankruptcy.

Grosvenor Woods, in reply.

COTTON, L.J. :—

This is an appeal from Mr. Justice *Pearson*, who dismissed the Plaintiffs' action. The Plaintiffs are Mr. *Easton* and Lord *Sheffield*.

It appears from the evidence that in November, 1882, Mr. *Easton* required money for the purpose of enabling him to conduct or go on with certain enterprises which he had entered into, and he applied to Lord *Sheffield* to enable him to borrow money. Lord *Sheffield* had a considerable quantity of *Grand Trunk of Canada* stock, and he was willing to assist Mr. *Easton*. It is unnecessary, to my mind, to enter into the question how it was that he agreed to assist him, or why he did so, or what was the connection between them—in fact he did so; and he put at Mr. *Easton's* disposal a considerable quantity of this stock, to enable him to borrow money from Mr. *Lewin Mozley*, who was a money-dealer in the city of *London*. In April, 1883, a further sum was required by Mr. *Easton*, and at that time Lord *Sheffield* put at his disposal, for the purpose of borrowing a further sum of £6000, bonds of the *Baltimore and Potomac Railway* and of the *Delaware and Hudson Canal*. These were put into the hands of Mr. *Mozley*, and with the stock he gave him transfers in blank. It was not necessary that the transfer of that stock should be by deed; but when those were filled up, after Lord *Sheffield* signed them, they did make an effectual transfer to the transferees named in the transfers. What was done by Mr. *Mozley* was this: according to his usual course he transferred to the banks—that is, to nominees of the banks—the stock; and he also deposited with one of the banks the bonds, in order to get money from them, and he did so not to secure the money which was due to him by Mr. *Easton*, but in order to secure whatever might be due from him to the banks, with whom he had considerable transactions.

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Early in May *Lewin Mozley* failed, and then Lord *Sheffield* claimed to redeem the securities from the bank, or the balance of the proceeds after deducting only what was due from *Easton* to *Mozley*. They refused, and insisted on the security which they had against whatever might be due from *Mozley* to them. That exceeded considerably the sums due from *Easton* to *Mozley*. In fact, I think before the demand was made, certainly before action brought, they had sold all these securities, and then the question really is how the account is to be taken, and whether they are answerable for any balance after satisfying what was due to *Mozley* from *Easton*.

The action, as I have said, was dismissed by Mr. Justice *Pearson*, and the Plaintiffs appealing opened the appeal, as if the principal question, and that on which the matter turned in the Court below, was whether there was a custom which would bind any one dealing with a money-dealer in the city of *London* that the money-dealers should be at liberty to deposit securities pledged to them by clients for their own debt without reference to the question of what was done as between them and their customers; and there was a great deal of evidence, which was read to us, which it was said had been relied upon to establish that custom. But that, in fact, was not the ground on which Mr. Justice *Pearson* decided it, nor was it ultimately the ground on which it was argued here. But in my opinion, and we all agree in that, although the evidence did shew that it was the course of dealing as between *Mozley* and these banks, and the general course of dealing and practice as between money-dealers in the city of *London* and the banks, from which they get money so as to enable them to lend to their customers, yet, in my opinion, there was no such general custom proved as would bind any one dealing with a money-dealer, unless it was shewn that he had notice of the practice, and he was proved to have dealt with him on the footing of that practice. But what Mr. Justice *Pearson* decided was this: he held that *Easton*, who in fact transacted the business with *Mozley* and borrowed the money, knew what the course of dealing was on *Mozley's* part, and that Lord *Sheffield* had put these securities into his hands with full authority to deal with them as he thought fit. That was the argument of Mr. *Cookson*, who

contended that Lord *Sheffield* put these securities into the hands of Mr. *Easton*, absolutely parting with them, not only authorizing him to raise money upon them—that is, to mortgage them—but giving to *Easton* such authority as would have justified *Easton* in selling them if he had thought fit.

Now that *Easton* knew what was the course of business of Mr. *Mozley* and what was his practice, in my opinion is made out by the evidence. It was in the evidence of Mr. *Mozley* stated distinctly that, before the transactions between himself and Mr. *Easton* began, he told Mr. *Easton* what he was in the practice and habit of doing, and, although Mr. *Easton* was a little doubtful as to the time when he knew it, he admitted he knew it, and admitted that he knew it before the second transaction took place in April, 1883, and did not contradict Mr. *Mozley* as to the time when he knew it. In my opinion it must be taken that he did know it. But, then, did Lord *Sheffield* either put these stocks and these bonds absolutely in the power of Mr. *Easton* so that Mr. *Easton* could have sold them if he had thought fit, or did he do anything more than authorize him to raise a certain sum of money upon them from Mr. *Mozley*, because Lord *Sheffield* knew with whom he was going to deal?

Mr. Justice *Pearson* relied upon this. He said, as I understand the reasoning of his judgment, *Easton* was borrowing as principal, and therefore he must have dealt with the securities as principal and not as on behalf of Lord *Sheffield*. It is very true that he was the borrower of the money. He alone was a debtor to *Mozley*, he was the principal in taking the loan, but that, to my mind, does not at all shew that he was authorized to deal with these securities by Lord *Sheffield* as if he was owner of them, to do whatever an owner might have done. Though I differ in what is a matter of fact from Mr. Justice *Pearson* it does not turn on the parol evidence before him—if it did I should have felt a difficulty in differing from him—but on the letters, and what is the proper inference from those facts which are relied upon by Mr. Justice *Pearson*. [His Lordship then considered the letters referred to, and said that the conclusion he had come to was that what Lord *Sheffield* acceded to was that these securities should be subject to the mortgage, but so that when his mortgage was paid off they should be returned to him.]

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Then we come to another point which was principally argued by the Respondents, and which I think is really the question on which this case turns. With respect to the alleged custom it was questioned whether it had been pleaded. It is unnecessary to consider that, because the main question to my mind is beyond that which is pleaded, can the banks in this case establish that they are purchasers for value without notice? Now, in order to consider that, one must see in what position they stood as regards what one may call the legal estate in these securities, because of course if it was a conflict of equities, and they had only an equitable title, the matter would stand on a very different footing from what it would do if they had acquired what I may call a legal estate. As regards the stock I have already said there were blank transfers signed; I believe they are under seal, but that is immaterial, a deed was not required, there were transfers signed by Lord *Sheffield* and the bank were not satisfied without having the shares actually in the names of trustees for themselves. The names filled in were, I think, the manager and the deputy manager in each case. Then there was a transfer of which Lord *Sheffield* had notice, into the names of their trustees. They therefore had the perfect title, the legal title, in that stock. As regards the bonds the matter stands on a different and more difficult footing. There were two classes of bonds, but one of them, the *Baltimore* bonds, clearly on their face purported to be payable to bearer. They might be entered in the books of the company, where they would remain and be inscribed, and then they could only be transferred, until they were made payable again to bearer, by a transfer in the books of the company; still they purport on the face of them to be bonds payable to bearer, transferred by being handed by bearer to bearer, by holder to holder. There is a little more doubt on the construction of the *Delaware and Hudson Canal Company's* bonds, because those have blanks for the names to be filled in of the person entitled to be paid the money; but, in fact, in these bonds no name was ever filled in, and there is a promise by the company to pay the amount of the bonds, 1000 dollars, to the legal holder of them. Then there is an indorsement that the holder may transfer the same at pleasure, either in person or by attorney, but only on the books of the company at their office. Now that

looks as if they were not transferable without such an entry in the books. But in my opinion that is not so until there has been an entry of the name in the books; but after that there must be a transfer in the way pointed out. We find this indorsement on the bond: "This bond may be registered in the owner's name in the company's books, such registry being noted in the bond by the company's transfer agent, after which no transfer shall be valid unless made in the company's books by the registered owner, and similarly noted on the bond, but the same may be discharged from registry by being transferred to bearer, after which it shall be transferred by delivery; but it may be again registered as before." So that I think both these classes of bonds stand in the same position, that the company agree that they will pay the money to the bearer, and that there may be a transfer (unless they are for the time being registered in the books of the company) by a mere transfer from hand to hand.

But we have to consider the question whether they are to be taken as negotiable securities, so that any one who takes them for value without notice will in no way be affected by any equity which a previous owner had, and we have evidence here that on the market in the city of *London* as a matter of fact these bonds are dealt with as negotiable. But to my mind the matter does not rest there, because on that evidence, although these are foreign instruments, not English bonds, I should hesitate to hold that in law these had become negotiable securities. But what is done by Lord *Sheffield?* He handed these over to Mr. *Easton* in order that he might mortgage them to Mr. *Mozley*, and then he put into Mr. *Mozley's* hand instruments which on the face of them represented that they were negotiable, that is to say, that if they had never been inscribed the company would recognise the holder for the time being, who took them by mere transfer, as the person to whom they were bound to pay this sum of 1000 dollars. That being so, I think the case comes within one of the grounds on which Lord *Cairns*, when Lord Chancellor, advised the House of Lords to come to the decision they did in *Goodwin* v. *Robarts* (1). In that case it was scrip—not exactly the same as the security in

(1) 1 App. Cas. 476.

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this case—but it was scrip which purported to give a title to the bearer and scrip of a foreign government, which promised to recognise the title of the bearer, just as if he were the original holder. The owner had placed them in the hands of his broker, as he said, simply for the purpose of getting bonds in exchange for the security, but the broker had improperly dealt with them. The question was whether the title of the holder under the broker could be maintained. At page 489 Lord *Cairns* says: "The appellant might have kept this scrip in his possession, and, if he had done so, no question like the present could have arisen. He preferred, however, to place it in the possession, and under the control, of his broker or agent, and although it is stated that it remained in the agent's hands for disposal or to be exchanged for the bonds when issued, as the appellant should direct, those into whose hands the scrip would come could know nothing of the title of the appellant, or of any private instructions he might have given to his agent. The scrip itself would be a representation to any one taking it—a representation which the appellant must be taken to have made, or to have been a party to—that if the scrip were taken in good faith, and for value, the person taking it would stand to all intents and purposes in the place of the previous holder." That is to say, that as between the owner and those who claimed from the broker, into whose hands he put them, the broker must establish his claim as if they were negotiable securities, and could not insist on any equity he had unless it was shewn that the person who took them had notice of the equity.

Really what we have to consider in this case is this, was there notice, either as regards this stock or as regards these bonds, of the title on which Lord *Sheffield* now insists? I have come to the conclusion on the evidence that the banks must be taken to have known that the securities on pledge with them were, or the greatest part of them were, securities taken by *Mozley* in the ordinary course of his business. But then what was the ordinary course of his business—not only the business of *Mozley* but the business of other persons in the same position, money-dealers? It was this, that they pledged the securities, or transferred the securities, on which they advanced money to their customers, not

with reference to the amount due as between themselves and their customers, but for whatever might be due by them to the banks, having regard to the market value of the securities which they deposited or transferred to the banks. Then, that being so, as these banks had bought the securities in one case as negotiable securities, that is to say, under circumstances which prevent Lord *Sheffield* from setting up any claim which he could not do if they were negotiable securities, and, in the other case, having got a perfect transfer of these shares, can we hold that as they were taking for value, they did not take *bonâ fide*, that is not without notice of the claim which is being insisted upon by Lord *Sheffield?* In my opinion they have in this case established their title as purchasers for value without notice. It is true they knew, and that was at first my doubt, that they were not to a very great extent the property of *Mozley*, but then they knew it was the practice of *Mozley* and other similar money-lenders to deal with their customers on the footing of mortgaging *en bloc* or transferring *en bloc* to secure their own debt, that on which they advanced their money to their customers. If that was what they knew, there was nothing in that which would give them notice of the claim now made by Lord *Sheffield*, who says, "I did not bind myself by any such contract, I had a right to insist on the transaction as between myself and *Mozley* only, without reference to his course of business and without reference to the way in which he pledged them to you." In my opinion the bankers, being purchasers for value, took under such circumstances that we ought to say they took fairly and in the ordinary course of business, and taking them as they did in the ordinary course of business, they had no notice of the right which Lord *Sheffield* now seeks to insist upon in contravention of that practice as between the banks and *Mozley*. In my opinion, although I have gone into matters which Mr. Justice *Pearson* did not go into, and have differed from the view which he took, I think that this appeal fails.

BOWEN, L.J.:—

I am of the same opinion. I agree with the Lord Justice in distinguishing between the ground on which the learned Judge in

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the Court below rested his judgment and the ground on which it appears to me, in common with Lord Justice *Cotton*, the judgment ought to rest.

I think we have first of all to consider a very simple question, which is, where is the legal estate or title to this stock, and to these bonds? And if we come to the conclusion rightly that the legal title was transferred to, and rests in the bank, the second question we have to ask ourselves is, upon what ground can we take away from the bank that which is their property at law?

Now with regard to legal estate or title. As to the stock which passes by instrument of transfer, it seems to me to be clear that the legal title was rightly transferred to and vested in the bank under the express or implied authority given by Lord *Sheffield* himself. It is true that he gave the instruments in blank to Mr. *Easton*, and therefore, as between himself and *Easton*, he had a right to complain if *Easton* filled up the blanks in any way except for the purposes for which he was entrusted with them. But the blanks were filled up with the names of the nominees of the banks as transferees in virtue of the authority given by Lord *Sheffield* to his agents to fill in the blanks, and if any doubt remained upon that subject, it would be put an end to by the fact that after the transfers were complete, Lord *Sheffield* had notice of what was done. It cannot therefore be maintained that as regards these transfers the legal estate or legal title is anywhere except in the banks.

We next come to the question of the legal title to the bonds. The true nature of the obligation created has I think been explained by the Lord Justice. The company here undertook to pay—irrespective of any other liabilities—the bearer for the time being of these bonds. They launch them on the world, and as the bonds pass from hand to hand of the bearer, fresh liabilities arise between the company and the person who takes the bonds. The bonds are capable of being inscribed, no doubt, and provision is made for that contingency on the face of the bond itself, but I think for the purposes of this case we may neglect that contingency. Now are these bonds negotiable? The evidence given upon that point has been alluded to. I am not myself so much

afraid, so jealous, as the law was in past times, of recognising the negotiability of instruments which all the commercial world recognises as negotiable, simply because they are not in the classified category of negotiable instruments. But then one must be careful to see that one is not ascribing to the commercial world a custom or habit which prevails only in a particular market or particular section of the commercial world, and before one draws the broad inference which was drawn by consent, be it observed, in the case of *Goodwin* v. *Robarts* (1), I should hesitate, and ask myself whether the thing had been thoroughly thrashed out, and whether the true inference taken on the evidence as a whole, and viewed by the light of strict commercial law, was not perhaps that these bonds were treated as negotiable in a certain class of the commercial world, without actually rising to the level of documents which the commercial world in general treated as negotiable, or which were negotiable by the law merchant.

Now a difficulty might perhaps arise because these bonds were under seal, as to which I will say nothing at the moment, because even if these bonds are not strictly negotiable and do not possess the incidents of negotiable instruments which are recognised as such, nevertheless a further question arises, whether Lord *Sheffield* by the way he has treated these bonds has not estopped himself from denying their negotiability, whether he has not—by placing for disposal, and with the intention that they should be transferred, in the hands of an agent of his own, bonds which on their very face purport to create a liability quite independent of anterior equities between the company and the person who takes them—really chosen to treat these bonds as negotiable, and to authorize his agent to treat them as such. If the negotiability of these bonds by estoppel, so to speak, arises, that disposes of all difficulty that would arise owing to the seal being attached to these bonds, because it is no longer a question whether they are strictly speaking negotiable, but whether Lord *Sheffield* has chosen to treat them as such. This second way of looking at the matter may be dealt with from two points of view, but practically they run into one another. You may say that Lord *Sheffield*—having placed in the hands of his agents

(1) 1 App. Cas. 476.

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these bonds with the intention that they should be transferred beyond these agents, and held his agents out to the world as clothed with authority to transfer them as negotiable—cannot afterwards, by any unknown dealing or any limitation of authority which he has conferred on his agents, prejudice those who took the bonds which have so been floated. Or you may say, which I think is a sound way of putting it, that as regards Lord *Sheffield* and the bank these bonds have become negotiable by estoppel, and therefore Lord *Sheffield* is precluded from saying the legal title to these bonds is not in the bank. Now if as between Lord *Sheffield* and the Defendants the legal title is in the bank, how are you going to take away from the bank that which belongs to them in law? You can only do it by shewing something that ought in equity to touch the conscience of the bank, some fact which arose during the transaction in the course of which they took the bond, or some matter brought to their cognizance that renders it now unjust, dishonest and unconscientious on the part of the bank to insist upon holding them against the original owner; I do not say the true legal owner, because that is the bank itself, but against the original owner, who certainly never intended (and I assume that throughout) that they should ever be dealt with in this manner. Now the bank took these documents, as has been described, according to the general usage and in the ordinary way of business. I do not think that would hurt Lord *Sheffield* if that was all that was proved, because I am satisfied that this general usage of the bank, if it rested upon that alone, is not a general usage which has become, so to speak, a custom of trade, or which would bind those who are ignorant of it. The evidence falls far short of anything of that sort. But having regard to the particular nature of these documents, the particular facility with which on their face they pass from hand to hand, what was in fact the representation made, I do not say expressly but impliedly by the agent, Mr. *Mozley*, when he brought these documents to the bank? Because until we know what the express or implied representation was, we cannot make up our mind how far the bank were put upon notice or ought to have considered whether or no there was some person in the back-ground who had a better right to the bonds than *Mozley*. It

seems to me that the only representation made by Mr. *Mozley* as regards these bonds was the ordinary representation which you would infer from the course of business between him and the bank. He brought them in a bundle to the bank, mixed up with other securities, and by so doing he impliedly represented to the bank that these bonds were bonds of which he had become possessed in his ordinary business of a money-dealer, that is to say, that they either belonged to himself, or what was more probable, that they belonged to other persons who had intrusted them to him to deal with in the ordinary way of his business. It may be said that this gives the bank notice that these bonds did not belong to Mr. *Mozley*, or might not belong to Mr. *Mozley*. Perhaps so, but *uno flatu* with that notice the bank are informed that although they may not belong to Mr. *Mozley* he had ample authority to deal with them. Take the whole of it together, would not the bank suppose, and rightly suppose, having regard to the nature of these documents, that Mr. *Mozley* was dealing honestly, and had the authority which he professed to have? I think they would. I think, therefore, that there was no notice which touches the conscience of the bank. The legal title in the bonds being in them, there is nothing to take that away from them. I believe the view we have arrived at to be the sound commercial view, but I do not myself lay stress on that, because very often the course of business in the City walks in front of the law merchant, goes a little in advance of it. I myself should not hesitate to say that it is quite possible that the bank may now conduct a great deal of their ordinary business quite at their own risk. That is the common practice of the commercial world. The commercial world bases its transactions, not upon the hypothesis of fraud, but upon the hypothesis of honesty, and I think it quite possible that the banks might choose to trust the money-dealers whom they knew, taking the risk of the money-dealers being honest as regards the clients. I do not base my decision, therefore, on the ground of the usage of the bank. It seems to me that the ground on which it should be placed is, that the legal title by the act of Lord *Sheffield* was rendered transferable and was transferred to the bank, and the bank at the time they took it from Lord *Sheffield's* agent had

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nothing which would give them notice that there were other rights in the background.

FRY, L.J.:—

There are two questions only in this case on which I shall make any observations. The first is the point on which the learned Judge who tried the action, the late Mr. Justice *Pearson*, determined this case, namely, with regard to the authority given by Lord *Sheffield* to Mr. *Easton*. In the view which that learned Judge took of the authority I am not able to agree. It appears to me that due weight was not given, in the conclusion at which he arrived, to the letter of the 28th of November, 1882, which was part of and expressed the final arrangement made between Lord *Sheffield* and Mr. *Easton*. There are in that letter sentences which seem to me not only to be the guiding sentences with regard to the true transaction between them, but which are quite inconsistent with the view taken by the learned Judge. Mr. *Easton*, stating in that letter the real agreement come to, said, "I am authorized to pledge for a period of six months ending the 31st May, 1883, and I undertake that the said stock shall be retransferred to you on or before the 1st June, 1883."

Now it appears to me that that expresses very briefly to us the nature of the bargain between them. Mr. *Easton* was authorized by Lord *Sheffield* to pledge the stock in question for a sum of £20,000 for that period. Coming to that conclusion, it is obvious that I cannot coincide in the ground of the judgment which the learned Judge expressed.

The second point on which I desire to say a few words is this. Have the banks made out their plea that they were purchasers for value without notice? That they were purchasers for value is not in dispute; but were they purchasers for value who had acquired the legal title? That question subdivides itself into two, according to the respective nature of the stock and shares.

One kind of property was, as we know, transferable by instrument, signed by Lord *Sheffield* and registered in the books of the company. Now with regard to that, Lord *Sheffield* executed transfers in blank, with the intention that they should be filled up with the names of the transferees. That intention was carried

into effect by his agent, Mr. *Easton*, or by Mr. *Mozley*, acting under Mr. *Easton's* authority. That fact was known to Lord *Sheffield* before the transfer in the books of the company was made, and, with his knowledge of the intention to register in the names of the managers of the banks, the transfers were duly registered. Thereupon it appears to me that in accordance with Lord *Sheffield's* intention, the legal estate in those shares had passed to the transferees named in the transfers.

With regard to the bonds the matter stands differently; but in my judgment the question with regard to the bonds is determined by the case of *Goodwin* v. *Robarts* (1) in the House of Lords. In that case Lord *Selborne* (2), in giving his decision, observed, "The scrip in this case is not one of those contracts in writing which have their nature, incidents, and effects, defined and regulated by British law, so that a Judge in a British Court is bound, without evidence, to know whether (and how, if at all), they are legally transferable, and to reject any evidence of a customary mode of transfer at variance with the law." That observation, or a similar observation, would apply to the instruments in the present case. They are not instruments of British contract, but they are bonds issued by foreign companies.

In the next place it appears to me that the case of *Goodwin* v. *Robarts* proceeds on two independent grounds of decision, the one the negotiability of the instrument according to the custom of the British *Stock Exchange* which was stated in the special case in that case: the other that of estoppel.

Now it appears to me that in the present case both those grounds of decision apply. I think that the evidence in the present case with regard to the negotiability of the instrument —though I confess I am doubtful how far such evidence would stand if a real and more thorough investigation had taken place— leaves it very difficult for me not to conclude that as between the parties to the present litigation, the negotiability of these intruments on the *London Stock Exchange* has been proved; and, if that be so, the first ground of decision in the case of *Goodwin* v. *Robarts* to which I referred applies, and governs this case. But even if that be not so, yet even more clearly in my judg-

(1) 1 App. Cas. 476. (2) 1 App. Cas. 494.

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ment does the other point of decision apply. Lord *Cairns*, then Lord Chancellor, expressed his view on that in this way (1): "The Plaintiff bought in the market scrip which, from the form in which it is prepared, virtually represented that the paper would pass from hand to hand by delivery only, and that any one who became *bonâ fide* the holder might claim for his own benefit the fulfilment of its terms from the foreign government. The appellant might have kept this scrip in his own possession, and, if he had done so, no question like the present could have arisen. He preferred, however, to place it in the possession, and under the control, of his broker or agent, and although it is stated that it remained in the agent's hands for disposal or to be exchanged for the bonds when issued, as the appellant should direct, those into whose hands the scrip would come could know nothing of the title of the appellant, or of any private instructions he might have given to his agent. The scrip itself would be a representation to any one taking it—a representation which the appellant must be taken to have made, or to have been a party to—that if the scrip were taken in good faith, and for value, the person taking it would stand to all intents and purposes in the place of the previous holder."

Without inquiring under what circumstances Lord *Sheffield* acquired the scrip, it is obvious that every other portion of that judgment of the Lord Chancellor in the case of *Goodwin* v. *Robarts* (2) applies *mutatis mutandis* to the bonds in the present case. Therefore it appears to me equally clear that what I call the second ground of decision in that case governs the present. I come therefore to the conclusion that the banks are right in saying that they are the holders of the legal estate in this property and for value.

But then arises the inquiry, whether they are or are not affected with notice, because it appears to me that the banks, being the legal holders of this property, are entitled to hold the same, unless they have received notice so affecting the conscience of the banks as to render it unrighteous in them to insist on the title on which they are now insisting. If such notice has been received, then the legal estate will not avail them in their present

(1) 1 App. Cas. 489. (2) 1 App. Cas. 476.

contention. If such notice has not been received, then they may hold the property by virtue of their legal estate. Now in the present case it is to be observed, there is no express notice to the banks from any one. The only notice they received is a notice derived from their knowledge of the character of the business which *Mozley* carried on, and from the course of business between *Mozley* and the bank. In my judgment the result of that knowledge and of that course of business is equivalent to a notice to this effect, that the securities were not the property of *Mozley*, but that he had power to dispose of them, so as to raise from the banks the entire sum he raised. I have no doubt that in the majority of cases, according to the ordinary course of business, that representation was a true one, and that there was nothing whatever in this particular transaction to put the bank on inquiry with regard to the truth of that representation; no circumstance of suspicion which would render it unfair in them to say that they had no further notice; and it is to be observed that, having regard to the general character of *Mozley's* business, there was a strong interest in those who dealt with him to enable him thus to pledge their securities, because, as far as I can gather, the probabilities of the case seem to indicate that this power enabled him to raise money from the banks on more advantageous terms than he could otherwise have done, and that a portion of this advantage, though of course not the whole of it, would accrue to those who dealt with him. Therefore I say I believe the representation I have stated to be the utmost of which the banks can be said to have had notice.

Assuming that to be the representation, it appears to me that it gives rise to a somewhat delicate inquiry, is the representation to be taken as a whole, or is it to be split into two parts? Is the conscience of the banks to be affected with the statement that the securities were not his own, and are they not to discharge themselves by force of the latter part of the representation that he had power to dispose of them? If they acted on the whole representation, must they be taken as acting on the latter part of the statement at their own risk? In my judgment that would not be a true or correct view of the case. The representation, which, as I have already said, is only one to be inferred

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from the course of business, must I think be taken as a whole: the notice must be taken as a whole. Consequently it appears to me that the banks received no notice which rendered it unrighteous for them to insist upon that title upon which they are now insisting, because if *Mozley's* statement had been true the course which the banks are pursuing is one perfectly justified by the authority which he possessed.

I think therefore the banks have sustained the plea which they have raised, that they are the purchasers of the legal estate for value without notice. I therefore agree that this appeal fails.

Solicitors for Plaintiffs: *West, King, Adams & Co.*

Solicitors for the *London Joint Stock Bank: Clarke, Rawlins, & Co.*

Solicitors for the *Capital and Counties Bank: Robins, Cameron, & Kemm.*

Solicitors for the *Royal Bank of Scotland: Gordon & Son.*

M. W.

C. A. 1886 *Nov.* 12, 15.

WILLIAMS *v.* JONES.

[1876 W. 203.]

Practice—Appeal for Costs—Administration Actions by Residuary Legatee—Rules of Supreme Court, 1883, *Order* LXV. *r.* 1.

An action was brought by a married woman and her infant children by their next friend against a trustee and executor, asking for administration of the trusts of a will and settlement, and for accounts of the principal and income of the trust property, making charges of misconduct against the Defendant and seeking to charge him with the costs of the action. At the trial an order was made for administering the trusts, with special inquiries as to the alleged acts of misconduct. On taking the accounts it appeared that the Defendant had before action given a correct account of the capital, but that in the accounts he had rendered of the income he had not accounted for nearly so much as he ought. The special cases of misconduct alleged against him were not substantiated. *Kay*, J. ordered the Plaintiff's costs relating to the income account, and the Defendant's costs of the rest of the action, to be taxed and set off against each other. The Plaintiffs appealed, asking that their costs, or at all events those incurred before the Rules of 1883, except those ordered to be paid by the Defendant, might be paid out of the trust property:—

Held, that the order was not appealable, for that the costs of a hostile

action, seeking to charge the defendant with costs on the ground of acts of misconduct, were not within the old rule of the Court of Chancery that the plaintiff in an administration action was entitled to costs out of the fund unless there were special grounds for depriving him of them, but were in the discretion of the Judge.

WILLIAM JONES, by will made in 1856, directed his trustees to convert his real and personal estate, and as to one-third of the proceeds to invest them and pay the income to his daughter *Mary Jones* for life for her sole and separate use without power of anticipation, and after her death upon trust for such persons as she should by deed or will appoint, and in default of appointment upon the trusts therein mentioned for her issue. He died in 1861, and his son the Defendant *Benjamin Jones* was the trustee and executor.

In 1867 *Mary Jones* married *William Williams*, and two settlements were executed, by one of which a small property bought for £470, and a sum of £300, and her one-third share of the testator's real estate (which third share it was recited would not exceed £800) were vested in *Benjamin Jones* as trustee upon trust to pay the income to *Mary Williams* for life for her separate use, and after her death to hold the *corpus* upon trust for her children as therein mentioned. The other was a settlement of £500 upon trust to pay the income to the Plaintiff *Mary Williams* for life, and after her decease to pay the interest of £300, part of the £500, to *William Williams* for life, and subject to these life interests upon trust for the children of the Plaintiff *Mary Williams* as therein mentioned.

In August, 1876, *Mary Williams* and her three infant children, by their next friend, commenced this action against *Benjamin Jones* and *William Williams*. The statement of claim alleged to the effect that from the time of the testator's death till her marriage the Plaintiff *Mary Williams* lived with *B. Jones*, that he studiously kept her in ignorance of the terms of the will and of her interest thereunder, and never paid her anything on account of the income to which she was entitled under it. That no account had been rendered by him to her before her marriage, and that the statement that her share under the will would not exceed £800 was untrue. That *B. Jones* had employed the testator's

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assets in carrying on his own farming business, and had made large profits by means of them. That *B. Jones* had retained in his own hands the whole of the moneys for the time being constituting the trust premises, and kept large balances, part of the testator's estate, in his hands. The claim was that the real and personal estate of *William Jones* might be administered; that the trusts of the will and the two settlements might be carried into execution; that in taking the accounts *B. Jones* might be charged with all such parts of the respective trust estates as he had improperly appropriated to his own use; that annual rests might be made of the balances in the hands of *B. Jones*, and that he might be charged with interest; that he might be removed from being trustee and new trustees appointed, and that he might be ordered to pay the costs of the action.

The action came on for trial as a witness action on the 12th of February, 1879, but was not heard as such, a judgment being taken for administration of the trusts of the will and settlements, with accounts and inquiries both as to capital and income, and also special inquiries as to balances in the hands of *B. Jones*, as to his employing them in his business, and as to the manner in which he had employed the trust estate.

Before the commencement of the action *B. Jones* had been applied to for accounts. He did not appear to have kept his accounts properly; but ultimately, before action commenced, he rendered an account shewing the amount of the capital of the trust funds in his hands, amounting to £1852, which, upon taking the account in the action, was found to be correct with the exception of an accidental omission of very trifling amount. He also rendered to Mrs. *Williams* an account of income, in which he made out a balance of only £2 due to her, and when repeatedly pressed for a better account, said there was no other. By the Chief Clerk's certificate, dated the 24th of July, 1883, a considerable sum was found due from *B. Jones* to Mrs. *Williams* in respect of income; and it appeared that at the commencement of the action he was substantially indebted to her on that account, having had from the date of the settlements a sum of £500 in his hands, for the interest on which he had not accounted. The special charges of misconduct failed.

The action came on before Mr. Justice *Kay* on the 30th of November, 1885, for further consideration. His Lordship was of opinion that as the account of capital rendered by the Defendant before action was substantially correct, the trustee could not be fixed with the costs relating to the capital account, and that the capital of the infant Plaintiffs could not be saddled with them as the suit had been of no benefit to them. As regarded the income, his Lordship considered that *B. Jones* had been wrong throughout, and ought to pay the costs of that part of the action.

The order directed the Taxing Master to tax the costs of *B. Jones* of the action, except so far as the same related to the account of income of the trust property, and to tax the costs of the Plaintiffs of the action so far as it related to the account of income of the trust property, and to set off the last-mentioned costs of the Defendant *B. Jones* and of the Plaintiffs, and to certify to whom, after such set-off, the balance was due. The order went on to direct payment of the balance, and gave liberty to *B. Jones* to apply for payment out of the estate of any balance found due to him, if he could not obtain payment from the next friend.

The Plaintiffs and the Defendant *Williams* appealed from this part of the order, and asked that *B. Jones* might be ordered to pay to the next friend of the Plaintiffs the taxed costs of the Plaintiffs of the action so far as it related to the income account, and that the Taxing Master might be ordered to tax as between solicitor and client, the costs of the Plaintiffs and of the Defendant *Williams* of the action, except so much as related to the income account, or, at all events, such of them as were incurred prior to the 24th of October, 1883, or subsequently thereto in connection with any proceedings then pending, and that such costs might be paid out of the trust property.

The appeal was heard on the 12th and the 15th of November, 1886.

W. Pearson, Q.C., and *Renshaw*, for the appeal:—

Under the old practice of the Court of Chancery the plaintiff in an administration action had a right to costs out of the estate unless there were special circumstances to disentitle him: *Farrow*

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v. *Austin* (1). If, then, we are not altogether within the saving in Order LXV., r. 1, which we submit we are, at all events the costs incurred before that rule came into operation are governed by the old practice, and an appeal will lie: *In re McClellan* (2). The case was one calling for investigation, as the Defendant was so much in the wrong as to the income, and it cannot be said that the proceedings were unreasonable so as to bring the case within *Croggan* v. *Allen* (3), though it turns out that the Defendant had sufficiently accounted for the capital.

Hastings, Q.C., and *Dauney*, for the Respondent, were not called upon.

COTTON, L.J.:—

This is an appeal from part of an order on further consideration as regards the costs. The Judge has ordered the Defendant, *Benjamin Jones*, who is the only trustee of a will and settlement, to pay a certain portion of the costs—that portion which related to the claim of the Plaintiff Mrs. *Williams* in respect of income. There the Defendant has been wrong, and the Judge has ordered him to pay those costs, but the Defendant is to recover under the decree the remaining costs of the action from the Plaintiffs.

The question which was argued in the Court below appears to have been whether the Defendant had so misconducted himself that he ought to bear all the costs of the action. The Judge, in his discretion, decided that he ought not, and he decided that the next friend ought to bear part of the costs. The Plaintiffs appeal against this part of the order, and the question arises whether there is an appeal in such a case. The contention has been that the costs of the action down to the 23rd of October, 1883, when Order LXV., r. 1, of the Rules of 1883, came into operation, were not costs within the discretion of the Judge, and that therefore there is an appeal. Now rule 1 of Order LXV. is this: "Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the

(1) 18 Ch. D. 58. (2) 29 Ch. D. 495.
(3) 22 Ch. D. 101.

discretion of the Court or Judge; Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division."

It was urged, but in the view we take of the case it is not necessary to decide the point, that the present Appellants are within that saving, though the case is not that of an executor, administrator, trustee, or mortgagee, but of a person having a right to costs out of a particular fund under the old practice.

Now undoubtedly the Court of Appeal in *Farrow* v. *Austin* (1) decided that the old practice of the Court of Chancery was that the plaintiff in an administration action had his costs out of the estate unless there was some special ground for depriving him of them, and that an order depriving him of them was subject to appeal. But does that apply to a case like the present? In my opinion it does not. That rule applied to an administration action, not to a hostile action where the plaintiff sought by various charges of misconduct to make the defendant personally liable to pay the plaintiff's costs of the action. This action is not an ordinary administration action. Here the married Plaintiff and her husband, who is a Defendant, joined in making an attack against *Benjamin Jones*, who was the brother of the married Plaintiff, and was a trustee in various capacities, and charged that while the brother and sister lived together the brother kept her in ignorance of her rights, and applied the property for which he was answerable as trustee for his own purposes, and carried on with it his own farming business for many years, and the Plaintiffs sought, on these grounds, to make him answerable for costs.

As regards the accounts, nothing has been gained by taking the accounts of the capital; but I do not go into that because that rather goes to the discretion of the Judge. I go upon this ground—here was a witness action, a hostile action as against the Defendant, in which the Plaintiffs sought to charge the Defendant with various breaches of trust, and it was brought on as a

(1) 18 Ch. D. 58.

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witness action. Unfortunately, perhaps, the Judge who tried the case did not decide those points at the trial and dismiss the action so far as it was a hostile one, directing only a simple administration account; but at the trial inquiries were directed not only with reference to the accounts, but also with reference to those matters in respect of which the Plaintiffs hostilely attacked the Defendant, and down to the further consideration the action continued to be one not of mere administration, but one in which the Plaintiffs sought to impeach the conduct of the Defendant and to make him answerable for costs. That part of the case has failed, and unless the case comes within the old rule of the Chancery Division to which I have referred, there can be no appeal against the decision of the Judge directing the Plaintiff to pay the costs of the hostile proceedings. Now, though I put the point to the Plaintiffs' counsel as soon as I found what the action was, and what the original decree was, no case was cited to shew that an action of this nature can be considered as an administration action coming within the rule to which I have referred. In my opinion the proper view to be taken is this, that this action throughout has been not an administration action in which the plaintiff under the old practice of the Court had a right to costs, subject to being deprived of them on special grounds, but it has from first to last been a hostile action, the costs of which were within the discretion of the Judge; and that being so, we cannot interfere with his discretion so far as he directed that the costs of this action should be borne by the Plaintiffs and not be provided for out of the capital fund.

In my opinion, therefore, the appeal fails.

BOWEN, L.J.:—

I am of the same opinion. I should prefer, if anything has to be added to what my Brother Lord Justice *Cotton* has said, that it should come from my Brother Lord Justice *Fry*, who is so familiar with this particular branch of the practice. I shall be content with saying that, as it seems to me, the broad answer to the appeal is that this is not an administration action but a hostile proceeding from first to last, and that, therefore, it does not properly fall within any old practice there may have been which

would give the plaintiff a right to costs out of the fund. If it be said that putting aside so much of the action as consists of hostile litigation, there is still a residuum which may be said to belong to the category of a claim for administration pure and simple, my answer is that the Plaintiffs have so mixed up the two as really to have conducted themselves unreasonably, and to have placed themselves, therefore, in any view, within the discretion of the Judge of the Court below according to Order LXV., rule 1.

FRY, L.J.:—

I entirely agree with what has been said by my learned Brothers, and I have very little to add.

It appears to me that the action was not an ordinary administration action. It was an action in which the married Plaintiff made very serious charges against her brother, the trustee. Many of those charges I cannot help thinking were of a very frivolous and vexatious description. The course taken was this. Instead of trying out those hostile charges at the trial, the Plaintiffs acceded to a suggestion, which it is said came from the Bench, but to which I cannot conceive that the Plaintiffs were bound to accede, that the matter should proceed upon inquiries. Accordingly there are no less than three inquiries to be found in the decree which have special reference to the alleged misconduct of the Defendant, *Benjamin Jones;* in other words, there are infused into the administration judgment questions which were in litigation prior to that judgment. The inquiries under that decree are really a mode of determining the hostile issues which were raised by the original pleadings. I think, therefore, that this is not a case of a simple administration action, in which undoubtedly the beneficiaries were *primâ facie* entitled to have the costs out of the fund; and in such a case as this there is, therefore, no appeal under the practice which existed prior to the recent orders. If the case had to be determined upon the other view, namely, that the Plaintiffs had a *primâ facie* right to costs, so that the inquiry would be whether there were or were not special circumstances which would justify the Court in exercising its jurisdiction

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in the way it has done, all I can say is, that my present impression is in favour of holding that there were such special circumstances as enabled the Judge to exercise his discretion in the way in which he did exercise it.

The appeal, therefore, will be dismissed with the usual result.

Dauney applied for a direction as in the order of the Court below, that if the Appellants could not pay the costs of the appeal the Respondent might have liberty to apply for payment out of the fund.

THE COURT declined to give any such direction, saying that if the Respondent had reason to doubt the solvency of the Appellants he should have applied for security for costs.

Solicitors for the Plaintiffs: *Pritchard & Sons*, agents for *Vaughan, Newport (Mon.)*.

Solicitors for the Defendant: *Child & Son*, agents for *Sayce & Baker, Abergavenny*.

H. C. J.

C. A. 1886 V.-C. B. *April* 19. C. A. *Nov.* 16.

GORRINGE *v.* IRWELL INDIA RUBBER AND GUTTA PERCHA WORKS.

[1885 G. 310.]

Company—Winding-up—Assets—Order and Disposition—Chose in Action—Assignment of Debt—Notice—Judicature Act, 1875, *s.* 10 [*Revised Ed. Statutes, vol. xvii., p.* 740]—*Bankruptcy Act*, 1883, *s.* 44, *sub-s. iii.—Companies Act*, 1862, *s.* 153 [*Revised Ed. Statutes, vol. xiv., p.* 235].

The Bankruptcy Rules as to reputed ownership are not imported into the winding up of companies by sect. 10 of the *Judicature Act*, 1875.

A limited company being indebted to *H. & Co.* on an acceptance, wrote to them a letter in January, 1885, in the following terms:—"We hold at your disposal the sum of £425 due from Messrs. *C. & Co.* for goods delivered by us to them up to the 31st of December, 1884, until the balance of our acceptance for £660 has been paid."

No notice was given by *H. & Co.* to *C. & Co.* until the 5th of February, 1885, which was after a petition for winding up the company had been presented:—

Held, that the letter was an immediate equitable assignment to *H. & Co.*

of all the debt due from *C. & Co.* to the amount of £425, and was complete as between the assignors and the assignees without any notice to *C. & Co.*

That as the Bankruptcy Rules as to reputed ownership do not apply to the winding up of companies, the debt did not form part of the assets of the company at the commencement of the winding-up.

In re Crumlin Viaduct Works Company (1) approved.

MESSRS. *HEILBUT, SYMONS & CO.* supplied goods to the *Irwell India Rubber and Gutta Percha Works, Limited*, and held an acceptance of the company for £660 14*s.* 11*d.* drawn on account of the goods. The company being unable to meet the bill on the 11th of January, 1885, when it became due, Messrs. *Heilbut, Symons & Co.* agreed to withdraw the bill on having the debt secured by an acceptance of another firm and by a charge on a debt due to the company from Messrs. *Cayzer, Irvine & Co.*

The company accordingly wrote them a letter in the following terms:—

"23rd January, 1885.

"As arranged with Mr. *Joseph*, we have sent you Messrs. *Browne & Co.'s* acceptance in our favour for £192 15*s.*, and hold at your disposal the sum of about £425 due to us from Messrs. *Cayzer, Irvine & Co.* for goods delivered by us to them up to the 31st of December, 1884, until balance of our acceptance of £660 14*s.* 11*d.* in your favour, and which fell due on the 11th inst., and is retired by you, has been paid."

On the 2nd of February, 1885, a petition was presented for winding up the company, and on the 28th of February an order for winding it up was made by the Court.

On the 5th of February, Messrs. *Heilbut, Symons & Co.* gave notice of their charge to Messrs. *Cayzer, Irvine & Co.*

On the 9th of February, 1885, an action was commenced by *R. Gorringe* against the company to enforce a mortgage security on their property dated the 20th of January, 1882, and a receiver was appointed in the action.

The sum due from Messrs. *Cayzer, Irvine & Co.* amounted to £417 14*s.* 11*d.*, of which £235 17*s.* 5*d.* was due for goods supplied before the 31st of December, 1884.

The sum of £417 14*s.* was paid by them into a bank to the

(1) 11 Ch. D. 755.

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joint account of the official liquidator and Messrs. *Heilbut, Symons & Co.*, and this summons was taken out by the liquidator before Vice-Chancellor *Bacon* to determine to whom it belonged, and was heard before His Lordship on the 19th of April, 1886. The summons was adjourned into Court.

Swinfen Eady, for the liquidator, contended that as *Heilbut & Co.* had failed to give notice to *Cayzer, Irvine & Co.* the debt in question remained in the order and disposition of the company at the time of the winding-up, and therefore the liquidator had priority over all other parties: *Dearle* v. *Hall* (1).

Marten, Q.C., and *W. C. Druce*, for the Plaintiff, contended that his priority as mortgagee under the mortgage of 1882 remained unaffected. They referred to *Ryall* v. *Rowles* (2) and the *Companies Act*, 1862, ss. 84, 153.

E. Ford, for *Heilbut & Co.*, contended that the Rules in Bankruptcy as to order and disposition did not apply to the winding up of companies: *In re Crumlin Viaduct Works Company* (3), and that *Heilbut & Co.'s* title was good against the company immediately the charge was given.

Swinfen Eady, in reply.

BACON, V.C., said the question was whether this debt was at the time of the winding-up part of the assets of the company, so that the liquidator was entitled to receive it. In his opinion it could not be doubted that it was, and that from the date of the presentation of the petition the right to the debt vested in the liquidator, it being part of the assets in the winding-up. *Dearle* v. *Hall*, which was still law, in his opinion settled the question. The assignee of a *chose in action* must do all he could or ought to do in order to change the visible ownership of it: if it was a debt, as in the present case, he must give notice of the assignment to the debtor. It was admitted that no notice was given by *Heilbut & Co.* to the debtors, *Cayzer, Irvine & Co.*, until after the

(1) 3 Russ. 1. (2) 2 W. & T. L. C. 4th Ed. p. 777.
(3) 11 Ch. D. 755.

commencement of the winding-up. *Heilbut & Co.* having thus failed to give notice, a title prior to theirs was created by the Act of Parliament, and could not lawfully be disputed. In his opinion the liquidator had the right not only to present this summons, but also to have an order made for payment to him of the sum in question: *Heilbut & Co.* to have no costs of the application.

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From this decision *Heilbut & Co.* appealed. The appeal was heard on the 16th of November, 1886.

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Everitt, Q.C., and *E. Ford*, for the Appellants:—

The letter of the 23rd of January, 1885, was an immediate equitable assignment of the debt due from *Cayzer, Irvine & Co.* to the company, not only so far as it was in respect of goods supplied before the 31st of December, 1884, but for all which was due. The charge was complete as between the assignors and assignees without the necessity of giving notice to the debtors: *Ryall* v. *Rowles* (1).

It is contended by the Respondent that the Bankruptcy Rules as to order and disposition are imported into the winding up of companies by the 10th section of the *Judicature Act*, 1875, but that section only refers to the Rules of Bankruptcy respecting the rights of secured and unsecured creditors *inter se*. The question here is whether this debt belonged to the company at all at the date of the winding-up petition. In *In re Crumlin Viaduct Works Company* (2), *Jessel*, M.R., decided this very point, and the same principle was acted on in *In re Count D'Epineuil* (3) and *In re Withernsea Brickworks* (4).

Swinfen Eady, for the liquidator:—

The letter of the 23rd of January, 1885, was not an immediate assignment of the debt, but only an undertaking to pay *Heilbut & Co.* out of the debt when they had received it, therefore the debt was the property of the company at the commencement of the winding-up and could not be disposed of afterwards: *Companies*

(1) 2 W. & T. L. C. 6th Ed. p. 848.
(2) 11 Ch. D. 755.
(3) 20 Ch. D. 217.
(4) 16 Ch. D. 337.

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Act, 1862, s. 153. But if it was an assignment of the debt it was not completed till the assignee had done all that he could to perfect it by giving notice to the debtors: *Dearle* v. *Hall* (1). It was still in the order and disposition of the company, and the Rules in Bankruptcy apply to it under sect. 10 of the *Judicature Act*, 1875. Questions of reputed ownership are clearly included in the words "the respective rights of secured and unsecured creditors." The question here is whether the Appellants are entitled to the rights of secured creditors. *In re Crumlin Viaduct Works Company* (2) has never been affirmed by the Court of Appeal and ought not to be followed. At all events the Appellants have only a charge for money due for goods supplied before the 31st of December, 1884.

COTTON, L.J.:—

This is an appeal from an order of Vice-Chancellor *Bacon*, who decided that the Appellants have no claim on the fund representing the debt due from Messrs. *Cayzer, Irvine & Co.* to the company. The Appellants claim an equitable charge on the debt, but the Vice-Chancellor has held that the fact of their not having given notice of their charge to the debtors before the commencement of the winding-up, prevented them from claiming the benefit of such charge. I cannot agree with that view. On what grounds are the Appellants to lose the benefit of their charge? It is contended that in order to make an assignment of a *chose in action*, such as a debt, a complete charge, notice must be given to the debtor. It is true that there must be such a notice to enable the title of the assignee to prevail against a subsequent assignee. That is established by *Dearle* v. *Hall*, but there is no authority for holding this rule to apply as against the assignor of the debt. Though there is no notice to the debtor the title of the assignee is complete as against the assignor.

But it is contended that the fact of the assignor being a company in process of winding up makes a difference. It is said that by the *Companies Act*, 1862, s. 153, all dispositions of the property, effects, and things in action of the company, made

(1) 3 Russ. 1. (2) 11 Ch. D. 755.

between the commencement of the winding-up and the order for winding-up shall, unless the Court otherwise order, be void; and it is contended that the notice given in this case comes within that section. If notice is not otherwise necessary I do not see how that section can apply. It really refers to dispositions by the company of property that belonged to the company at the date of the commencement of the winding-up. It cannot apply to dealings with property which had been assigned by the company before the winding-up.

Then the Respondent relies on sect. 10 of the *Judicature Act*, 1875, and it is said that that section introduces into the winding-up of companies the order and disposition clause of the *Bankruptcy Act*. I am of opinion that that view is not correct. This case appears to me to come within none of the provisions of that section. What the section says is that in the administration of insolvent estates by the Court, and in the winding up of insolvent companies, "the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt." In my opinion this cannot apply to Rules of Bankruptcy respecting order and disposition. It is not intended to bring into the assets of the estate being administered, or of the company being wound up, any property which would not be otherwise assets, but to regulate the mode of dealing with the assets which are proved to belong to the company: it was to do away with the difference which was known to exist between the mode of dealing with the assets in bankruptcy and the assets in an administration or in a winding-up by the Court of Chancery. The order and disposition clause in the *Bankruptcy Act* has nothing to do with the respective rights of the secured and unsecured creditors, but is intended to include in the estate which is being administered property that would otherwise belong to somebody else. The clause in question, 46 & 47 Vict. c. 52, s. 44, sub-s. iii., enacts that the property of the bankrupt divided among his creditors shall comprise "All goods being, at the

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commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof." It is clear to my mind that this was not made applicable to the winding-up of a company by the 10th section of the *Judicature Act*, 1875, and so it was decided by the late Master of the Rolls, Sir *G. Jessel*, in *In re Crumlin Viaduct Works Company* (1), and the same principle was acted on by the Court of Appeal in *In re Withernsea Brickworks* (2). That case did not decide the precise point in this case, because the question there related to the rights of an execution creditor, but it shews that in the opinion of the Court the 10th section could not affect cases when the question was whether the property belonged to the company or to somebody else. I am therefore of opinion that the absence of notice did not prevent the Appellants from having a good charge on the debt of Messrs. *Cayzer, Irvine & Co.*

It was, however, contended that the letter did not operate as an immediate charge on the debt. In my opinion this view is not correct. When there is a contract for value between the owner of a *chose in action* and another person which shews that such person is to have the benefit of the *chose in action*, that constitutes a good charge on the *chose in action*. The form of words is immaterial so long as they shew an intention that he is to have such benefit. In the present case the effect of the letter is perfectly clear. It is contended that the true construction of the letter is that the Appellants are to have no charge on the debt till the company have received the money; but that when they have received it, they shall deal with it in a particular way; but I think the Appellants had a good equitable assignment, and had a right to insist on the debt being paid to them and not to the company. Then as to question of the amount of the debt assigned. It was contended that it only included the money due for goods delivered up to the 31st of December, 1884. I am of opinion that it was intended to include all the debts due from Messrs. *Cayzer & Co.* to the amount of £425. There must, therefore, be a declaration to that effect.

(1) 11 Ch. D. 755. (2) 16 Ch. D. 337.

BOWEN, L.J.:—

I am of the same opinion. The Appellants claim a charge which is resisted by the Respondent on two grounds. His first point is that the security was not complete, because no notice was given to the debtor before the commencement of the winding-up. The rule that notice of the assignment of a *chose in action* is necessary is a rule as between the different incumbrancers; but there is no necessity for such notice as between the assignor and the assignee. In the present case, therefore, the objection cannot prevail, unless the winding-up of the company makes a difference. It is clear that the 153rd section of the *Companies Act*, 1862, has no application. Does the 10th section of the *Judicature Act*, 1875, affect it by introducing the rule as to reputed ownership? If we look at the natural meaning of the words of the section, it is clear that the case is not within sect. 10. If we pass to the authorities, it was decided by the late Master of the Rolls in *In re Crumlin Viaduct Works Company* (1) that the sub-section as to order and disposition was not introduced into the winding-up of companies; and a similar view was taken by Lords Justices *James* and *Cotton* in *In re Withernsea Brickworks* (2).

But, assuming that there is no objection on account of the absence of notice, was there an equitable assignment at all? Clearly there was. There was a contract for value that the Appellants should have the benefit of the debt, and if the letter was not an assignment, I do not understand what would be. The benefit of the debt clearly passed to the assignees.

With regard to the amount of the money payable, I agree that the assignees are entitled to the whole debt not exceeding £425.

FRY, L.J.:—

I am of the same opinion. The first question is whether the 153rd section of the *Companies Act* applies. In my judgment it has no application. It relates to the dealings with the assets of the company after the commencement of the winding-up; but this debt is no part of the assets of the company.

The next question is as to the 10th section of the *Judicature*

(1) 11 Ch. D. 755. (2) 16 Ch. D. 337.

C. A. 1886 GORRINGE v. IRWELL INDIA RUBBER AND GUTTA PERCHA WORKS. Fry, L.J.

Act, 1875—namely, whether the effect of that section is to make the reputed ownership clause of the *Bankruptcy Act* apply to this case. But the 10th section relates only to the respective rights of the secured and unsecured creditors. The question here is whether there is any security or not. And further, it is to be noticed that the section is intended to regulate the distribution of property that has fallen into the assets, not to enlarge the area of the assets.

Then two further questions have been raised as to the construction of the letter of charge. First, it is said that it created no charge at all. I think that it did. It made the writer of the instrument a trustee of the debt for the Appellants, and therefore it is equivalent to an equitable assignment. The second question is whether, on the true construction of the instrument, the Appellants are entitled to the whole of the debt which is described as "about £425," or only to what was due for goods supplied before the 31st of December, 1884. I am of opinion that they are entitled to the whole debt, up to the limit of £425.

Solicitors for the Appellants: *Tamplin, Tayler, & Joseph.*
Solicitors for the Liquidator: *Godden, Holme, & Co.*

M. W.

C. A. 1886 Nov. 16.

In re COURTIER. COLES *v.* COURTIER. COURTIER *v.* COLES.

[1884 C. 943.]

Tenant for Life and Remainderman—Leaseholds—Repairs—Trustees—Power of Sale—Jurisdiction of Court to interfere with Discretion of Trustees.

A testator gave leaseholds, some of which were held on short terms, to two trustees, one of whom was his wife, upon trust for his wife for life, and after her death upon trust that the whole should be sold, and the proceeds divided between four persons. And he authorized his trustees, provided they should deem it advisable, to sell his short leaseholds and invest the proceeds and allow his wife to receive the income during her life.

The leaseholds were in a bad state of repair at the death of the testator; the widow kept them up in the same state of repair, but declined to do

more than this. The remaindermen applied for an order to oblige the tenant for life to maintain the leaseholds in such a state of repair as to satisfy the covenants in the leases, so as to avoid a forfeiture, or else to concur in selling the short leaseholds:—

Held (affirming the decision of *Bacon*, V.-C.), that there was no obligation on the tenant for life to put the premises in such a state of repair as to comply with the terms of the leases.

In re Fowler (1) distinguished.

Held, also, that the Court had no jurisdiction to interfere with the discretion of the widow, who had then become surviving trustee, and to order her to exercise her power of selling the leaseholds.

Tempest v. *Lord Camoys* (2) distinguished.

W. A. COURTIER, by his will, dated the 17th of September, 1882, after directing his debts, funeral, and testamentary expenses to be paid as soon as convenient, appointed his wife and his brother-in-law, *George Coles*, the executors and trustees of his will. And he gave and devised all his real and personal estate unto his said trustees upon trust for his said wife for life, and after her decease he directed that the whole should be sold, and the funds arising therefrom equally divided into four parts between the said *G. Coles*, *Susannah*, the wife of *G. Coles*, *W. R. Smith* and *C. Sewell*. And he authorized his said trustees, provided they should deem it advisable, to sell any portion of his short leaseholds, messuages, or tenements, and to invest the proceeds arising therefrom in Government securities or mortgages, and to allow his wife to receive the income therefrom for the term of her natural life.

The testator died in October, 1882. His estate consisted principally of leasehold houses, some of which were held on terms of which thirty or forty years were unexpired, but the greater part were held on short leases and were let to weekly tenants. The trustees paid the rents to Mrs. *Courtier*, the widow, who kept the houses in the same state of repair in which they were at the time of the testator's death; but it was admitted that the houses held on short leases were in a bad state of repair, and that unless a considerable sum were laid out the testator's estate would be liable to heavy claims for dilapidations on the expiration of the leases.

G. Coles took out an originating summons, asking for a sale of

(1) 16 Ch. D. 723. (2) 21 Ch. D. 576, n.

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the property, as Mrs. *Courtier*, his co-trustee would not consent to a sale in exercise of their power. Mrs. *Courtier* took out a cross summons for the administration of the estate, and obtained an order for administration. When the cause came on for further consideration before Vice-Chancellor *Bacon*, *Smith* and *Sewell*, two of the persons entitled in remainder asked in the alternative that Mrs. *Courtier* might be ordered out of the rents and profits to put the houses into repair in accordance with the covenants in the leases. It was estimated that about £1400 would be required for this purpose, which was about the amount of the gross annual rental of the houses. The only portion of the testator's estate which had been realized, besides the leaseholds, was about £700, which was in Court.

The Vice-Chancellor made no order either on this question or on the question of sale, except that the costs should be costs in the cause.

G. Coles died after the date of the order.

Smith and *Sewell* appealed from the order.

Sir *A. Watson*, Q.C., and *Swinfen Eady*, for the Appellants:—

The tenant for life takes the benefit of the leaseholds, subject to the liabilities affecting them. She is only entitled to the net income after satisfying the charges on them. It is her duty to keep them up, so as to avoid a forfeiture in breach of the covenants. If this is not done there will be nothing left for the remaindermen: *Bothamley* v. *Sherson* (1); *Hawkins* v. *Hawkins* (2); *In re Hotchkys* (3). As the surviving trustee the widow is bound to preserve the property, and the rents are the first fund for that purpose: *In re Fowler* (4).

The power of sale during the life of the widow was given by the testator to meet such a state of circumstances as has occurred. Unless some of the leaseholds are sold the whole will be lost. It has therefore become the duty of the surviving trustee to exercise the power. It is not a mere discretion, but a trust, and ought to be enforced by the Court. Where such a power is connected with the management of an estate the Court will compel the trustees

(1) Law Rep. 20 Eq. 304.
(2) 13 Ch. D. 470.
(3) 32 Ch. D. 408.
(4) 16 Ch. D. 723.

to exercise it; and it is equally right that the Court should interfere in this case, because the widow being both tenant for life and sole trustee there is a conflict of interests: *Nickisson* v. *Cockill* (1); *Tempest* v. *Lord Camoys* (2).

Marten, Q.C., and *Hatfield Green*, for Mrs. *Courtier*, were not called on.

COTTON, L.J.:—

This is an appeal from a decision of Vice-Chancellor *Bacon*. The application is of a twofold character: the Appellants ask the Court either to order the tenant for life to put the leaseholds in her possession into a satisfactory state of repair, so as to comply with the covenants in the leases, or else to order her as surviving trustee to sell the short leaseholds.

The will is very short, indeed we may say it is too short, for it does not provide against the difficulties which are almost sure to arise. [His Lordship read the will.] Here there is no mention of leaseholds in the gift to the trustees, but the testator's estate did in fact consist principally of leaseholds, many of which were held on short terms. Most of them were at the death of the testator, and are now, in a very bad state of repair. The widow has kept them in the same state as they were in at the testator's death, but declines to put them in such a state of repair as to satisfy the covenants in the leases.

With respect to that question it is admitted that the words of the will are such that it cannot be contended that there is a trust for immediate conversion; but it is said that if the widow is to have the right to possess the leaseholds in specie during her lifetime, she is bound to spend her money in putting them into sufficient repair to satisfy the covenants of the leases. I think that there is no such obligation on her. She is not bound to the landlords under the covenants; the trustees are bound, and it is their duty to repair the houses in accordance with the covenants in the leases out of the *corpus* of the estate. There is no rule of law that the tenant for life is bound to do these repairs out of the rents and profits. She is to enjoy these leaseholds in specie, but she is under no covenants to repair, and there is

(1) 3 D. J. & S. 622. (2) 21 Ch. D. 576, n.

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nothing in the will to shew that the testator intended her only to have the net rents after making provisions for the liabilities that arose in the testator's lifetime. It cannot be fairly left to the widow to make good the deficiencies of the testator. The Appellants relied on *In re Fowler* (1). But that was a very different case, and the question which arose there does not arise here. Here it is not a question whether the trustees are bound to keep up the houses, but whether the tenant for life is bound. In that case the question was whether trustees ought out of rents and profits in their hands to provide for the repairs, and Lord Justice *Fry* decided that as under the terms of the will they were to receive the rents, and to preserve the property for the remaindermen it was their duty to apply the rents in their hands towards the repairs. No question was decided there between the tenant for life and the remaindermen: only that the trustees, having the property in their hands and having the duty to receive the rents and profits, had also the duty to keep that part of the estate in repair, and having nothing but rents and profits in their hands they must apply them for this purpose. If it had been a decision between tenant for life and remaindermen, I should have had some difficulty in following it. But I consider it is no authority in the present case.

The second question we have to decide is whether the Court ought to compel the surviving trustee to sell the short leaseholds. I can see no reason for the Court making such an order. There is an imperative trust for sale after the death of the tenant for life, but during her life the short leaseholds are only to be sold if the trustees should think it advisable. This power is not a part of a general trust for the management of the estate; it is a mere discretion given to the trustees. It is true that in such cases as *Nickisson* v. *Cockill* (2) and *Tempest* v. *Lord Camoys* (3), where there was what appeared to be a mere discretionary power, the Court dealt with it as part of a trust for management of the estate, and interfered with the trustees' discretion. But those cases were decided on the special terms of the will; the Court considered the power introduced in the trust for management, as part of the trust. But it is clearly settled law that where the

(1) 16 Ch. D. 723. (2) 3 D. J. & S. 622.
(3) 21 Ch. D. 576, n.

trustees have a power as distinguished from a trust, although the Court will prevent them from executing the power unreasonably, it will not oblige them to exercise it. Those cases, therefore, do not apply to the present will, in which the power is no part of any trust, but a mere discretion.

On both points, therefore, the appeal fails.

BOWEN, L.J.:—

I am of the same opinion. The first question on this appeal is whether the tenant for life is bound to keep the leaseholds in such a state of repair as to prevent forfeiture. These houses are given to the widow during her life. What obligation is there on her? Is she to take on herself the entire burden and repair them out of her own money, or only to expend the income which she derives from the rents and profits of the property? Whichever way the point is put, the obligation is quite imaginary: it can arise nowhere unless it is to be found in the will. It is admitted that it is not to be found in the will, therefore it does not exist. The Lord Justice *Cotton* has explained the distinction between this case and *In re Fowler* (1), and I agree with him. That case did not decide the rights as between the tenant for life and the remaindermen.

The other question which we have to decide is this. Ought we to direct the surviving trustee to exercise the power of sale given to the trustees by the will? Is the authority part of a general trust of management? If so, it might fall within the principle of *Tempest* v. *Lord Camoys* (2). One can understand that where the machinery for management of the estates is given to the trustees by will, and the Court undertakes to enforce the trusts for management, it is right for it to compel the trustees to utilize the machinery entrusted to them. It does not appear to me that this is a case like that; it is clearly a mere discretion given to the trustees with which the Court will not interfere.

FRY, L.J.:—

I am of the same opinion. With respect to the first question, whether the Court has power to order the tenant for life to put

(1) 16 Ch. D. 723. (2) 21 Ch. D. 576, n.

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the premises into repair which were out of repair at the death of the testator, I am unable to find any principle or rule of law which throws any obligation on her to do this; and as there is an entire want of authority in its favour, it is clear that there is no such obligation. Reliance has been placed on *In re Fowler* (1). Whether that decision is right or wrong, it does not govern the present case. There the testator had appointed the plaintiff and defendants trustees of his will, and had bequeathed certain leasehold houses to them upon trust to receive the rents and profits, and pay the same to one of the defendants during her life without power of anticipation, and after her death she directed both trustees to stand possessed of the houses for two other persons. So that there were two trusts, to pay the rents to the tenant for life, and to have the property forthcoming at her death. The action was brought by one of the trustees to carry into effect the trusts of the will. I proceeded, in my decision, on the ground that it was the duty of the trustees to have the property forthcoming at the death of the tenant for life; and as that could only be done by expending the rents in repairs, I declared that they ought so to expend them. I decided no general principle as to the rights of the tenant for life and remaindermen, and nothing as to making good the defaults of the testator in his lifetime. The contention of the Appellants is without a shred of authority to support it.

Then it is suggested that the power of the trustees to sell the short leaseholds is coupled with a trust, and ought to be enforced by the Court. I cannot find any trust here. It is suggested that the mere fact that some of the leaseholds were short created a trust for sale. I think it is impossible to find any trust in this case; the power is merely discretionary, and the Court will not interfere to enforce the exercise of it. The appeal altogether fails.

Solicitors for Appellants: *Hicklin, Washington, & Pasmore.*
Solicitor for Respondent: *G. W. Barnard.*

(1) 16 Ch. D. 723.

M. W.

COLEMAN *v.* LLEWELLIN.

C. A.
1886
NORTH, J.
Oct. 29.
C. A.
Nov. 23.

[1882. C. 2461.]

Mortgage—Foreclosure—Accruing Rents—Further Account—Time for Redemption.

At the date limited for redemption in a foreclosure action money was in Court and in the hands of a receiver paid under a mining lease since the issue of the Chief Clerk's certificate. The foreclosure judgment gave liberty to any persons redeeming, or, in the event of foreclosure, to the Plaintiffs, to apply for payment to themselves of funds in Court or in the hands of the receiver:—

Held (reversing the decision of *North*, J.), that the Plaintiffs were entitled to an immediate order for foreclosure absolute, and for payment of the money in Court and in the hands of the receiver without any further account.

Jenner-Fust v. *Needham* (1) distinguished.

THIS was an action by first mortgagees against two sets of subsequent incumbrancers and the mortgagors. A receiver had been appointed in the action. The mortgaged property was subject to a mining lease. An order for foreclosure was made by Mr. Justice *Pearson* on the 14th of May, 1884, by which the mortgagors were absolutely foreclosed; the second mortgagee was allowed six months to redeem from the date of the Chief Clerk's certificate, and the third mortgagees were allowed a further time of three months from the date of a second certificate. And it was ordered "that any persons redeeming the premises under the provisions of this order, or the Plaintiffs in the event of foreclosure, are to be at liberty to apply to the Judge in Chambers for payment and transfer of any money or the annuities in Court to the credit of this action, or in the hands of the receiver." The Chief Clerk on the 15th of June, 1885, certified that there would be due to the Plaintiffs for principal, interest, and costs on the 15th of December, 1885, the sum of £1359 16*s.* 4*d.* The first Defendant, the second mortgagee, made default, and on the 11th of January, 1886, an order for foreclosure absolute was made against him. The Chief Clerk made a second certificate dated the 10th of June, 1886, finding that on the 10th of September,

(1) 32 Ch. D. 582.

C. A. 1886 — COLEMAN v. LLEWELLIN.

1886, there would be due to the Plaintiffs for principal, interest, and costs the sum of £1448 13*s.*, and that that day was the day appointed for payment by the third mortgagees of the sum that would then be due.

Since the finding of the Chief Clerk's first certificate certain rents and royalties had been received by the receiver, some of which had been paid into Court, and the rest remained in the hands of the receiver.

This was a motion to have the foreclosure made absolute, and to discharge the receiver; that he might be ordered to pass his accounts and pay the balance that should be found due from him to the Plaintiffs; that his recognizances should be vacated, and that the sum in Court and in the hands of the receiver should be paid and transferred to the Plaintiffs.

The third mortgagees had been served with notice of the present motion but did not appear.

The motion was heard before Mr. Justice *North* on the 29th of October, 1886.

J. G. Wood, for the Plaintiffs:—

The difficulty of getting a foreclosure order made absolute within reasonable time, raised by the decision in the case of *Jenner-Fust* v. *Needham* (1), has been avoided by the form of the order, which provides for the holding of funds received *in medio*, so that they form part of the *corpus* of the estate which will come to the mortgagees only in case the foreclosure is made absolute, and which in case of redemption would have belonged to the mortgagors. It is right, therefore, that those funds should not be taken into account in determining the amount of redemption money. Unless the difficulty can be got over it will in some cases be impossible to get a foreclosure made absolute; it is not safe or right to leave rents uncollected, and they may be accruing daily or from week to week.

NORTH, J.:—

It seems to me that this case comes exactly within the principle of *Jenner-Fust* v. *Needham*. No distinction is attempted to

(1) 32 Ch. D. 582.

be drawn, except that it is said that in the decree particular words were introduced to provide for making the foreclosure absolute without further accounts, and the Plaintiffs' counsel insists that as there has been no redemption the mortgagees are entitled to the money received since the certificate as part of the property subject to their mortgage. But they are not entitled to it without giving the mortgagors an opportunity to redeem for a smaller sum than that found due by the certificate if they like.

A similar order must be made to that made in *Jenner-Fust* v. *Needham* (1). The receiver will pass his accounts, the sum in his hands and in Court will be paid and transferred to the Plaintiffs. A fresh certificate will be made, and a further time of one month will be allowed to redeem.

D. P.

From this decision the Plaintiffs appealed. C. A.

J. G. Wood, for the Appellants.

The third mortgagees had been served but did not appear.

COTTON, L.J.:—

In this case Mr. Justice *North* before making an order for foreclosure absolute directed the Plaintiffs, who were first mortgagees, to take into account money in Court and in the hands of the receiver, although an account had been already taken and default made, and the mortgagees had applied for foreclosure absolute. He did so because he held that the case was governed by *Jenner-Fust* v. *Needham*. That case expresses the general rule that in ordinary cases where a receiver receives rents between the date of the certificate and the day fixed for redemption, those rents should be taken into account, and a further period of a month should be allowed for redemption from the date of the fresh certificate. But here there was a special proviso inserted into the order that any person redeeming, or, in the event of foreclosure, the Plaintiffs, should be at liberty to apply in Chambers for the payment or transfer to them of the money which might be in

(1) 32 Ch. D. 582.

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Court or in the hands of the receiver. This must have been done by the special direction of the Judge. We do not know his reason for doing so, probably it was because the receiver would be receiving money, not as rents and profits, but in respect of minerals, which are part of the inheritance. At any rate, the plain intention was, that the money in the hands of the receiver should be dealt with as representing the inheritance, and should not come to the hands of the mortgagees unless they made themselves the owners of the inheritance by becoming entitled to foreclosure absolute, in which case they were to be at liberty to apply for it as part of the estate of which they were to become absolute owners. This case, therefore, differs from *Jenner-Fust* v. *Needham* (1), where there was no such direction. I think the Plaintiffs on obtaining an order for foreclosure absolute will be entitled to have the money paid out to them without any further account. The order appears to contemplate an application for this money in Chambers after the order for foreclosure absolute is made; but I think that as default has been made by the persons entitled to redeem we may make one order for foreclosure absolute and for payment of the money to these mortgagees.

FRY, L.J.:—

I am of the same opinion. It appears to me that Mr. Justice *Pearson*, in the order of May, 1884, did really determine prospectively the rights of the litigants to the moneys which might come to the hands of the receiver. That makes a broad distinction between this case and *Jenner-Fust* v. *Needham*.

The appeal must, therefore, be allowed.

Solicitors: *Peacock & Goddard.*

(1) 32 Ch. D. 582.

M. W.

WILLMOTT *v.* LONDON CELLULOID COMPANY.

C. A. 1886 Nov. 26.

[1884 W. 4298.]

Company—Winding-up—Debenture-holder—Mortgagee—Fraudulent Preference—Right of Action—Rule in Bankruptcy—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 164 [*Revised Ed. Statutes, vol. xiv., p.* 238]—*Creditors—Dealing by the Company in the course of its Business—Payment by Directors of Debt due to themselves.*

B. and *H.*, who were directors of a limited company, *B.* being the managing director, advanced moneys from time to time to the company to purchase goods and discharge pressing claims. In September, 1884, the company's premises were burnt down, and an insurance company admitted their liability to pay £3000 in respect of the damage. *B.* and *H.* then held a "directors' meeting," two directors forming a quorum, and passed resolutions for commencing actions against the company for the moneys they had advanced and for instructing solicitors to appear and consent on behalf of the company to immediate judgment.

The actions were accordingly brought and immediate judgment was taken by consent, and thereupon (the limited company being at the time practically insolvent), *B.* and *H.* obtained the £3000 from the insurance company under garnishee orders, and applied it in part payment of the debts due to themselves by the company. The company had issued mortgage debentures, each of which was in form a first charge upon all the property of the company both present and future, including uncalled capital, subject to the condition that such charge should be a floating security, and that the company might in the course of its business deal with the property charged in such manner as the company might think fit; and in December, 1884, the holder of one of these debentures brought an action on behalf of himself and the other holders of the debentures against the company and *B.* and *H.*, and claimed (1) repayment of the £3000 by *B.* and *H.*, and (2), the usual relief in a debenture-holder's action. Two days after the issue of the writs in this action a petition was presented for winding up the company, and shortly afterwards a winding-up order was made.

At the trial of the action the Plaintiff relied on sect. 164 of the *Companies Act*, 1862, as entitling him to recover the £3000 on the ground of "fraudulent preference:"—

It was held by *Bacon*, V.C. (1), that so much of the Plaintiff's claim as was based on fraudulent preference must be dismissed with costs; but (2) that as mortgagee he was entitled to the ordinary judgment for accounts and inquiries as to the debenture debt.

The Plaintiff appealed from the first part of the decision of the Vice-Chancellor, and at the hearing before the Court of Appeal it was contended on his behalf that the transaction complained of was not a dealing by the

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company in the course of its business with the property charged within the condition of the debenture :—

Held, by the Court of Appeal, first, that the decision of the Vice-Chancellor upon the question of fraudulent preference was right; and, secondly, that the transaction complained of, being in fact the payment of a just debt while the company was still a going concern, was a dealing by the company in course of business within the condition of the debentures; and that the appeal must be dismissed with costs.

THIS was an appeal by the Plaintiff from that part of the decision of Vice-Chancellor *Bacon* (1), in which His Lordship held that so much of the Plaintiff's claim as was based upon fraudulent preference must be dismissed with costs.

The facts of the case are fully stated in the report of the hearing in the Court below, and also appear sufficiently for the purposes of this report in the judgment of *Cotton*, L.J.

Warmington, Q.C., and *J. G. Laing*, in support of the appeal :—

This case was decided in the Court below upon the principle that the rule as to fraudulent preference which prevails in bankruptcy, and is by sect. 164 of the *Companies Act* of 1862 applicable to a company in process of winding up, can only be enforced for the benefit of the general body of creditors, and confers no right upon an individual creditor or the representative of a particular class of creditors claiming by virtue of a security, such as a debenture. We admit that principle, and also the authority of *Ex parte Cooper* (2), which was treated by the Vice-Chancellor as governing the present case; but we submit that by the terms of the debentures in this case these insurance moneys were included in the security of the debenture-holders, and were their property, subject only to the condition which provided that the charge created by the debentures should be a floating security, and that the company might in the course of its business deal with the property charged as the company might think fit. And we contend that this transaction was not a dealing by the company in the course of its business within the meaning of the condition.

At the time the Defendants *Hanbury* and *Bayley* obtained possession of the insurance moneys, which were the only sub-

(1) 31 Ch. D. 425. (2) Law Rep. 10 Ch. 510.

stantial asset of the company, the company was hopelessly, and to their knowledge, insolvent.

[FRY, L.J.:—Assuming that the insurance moneys were covered by the terms of the debentures, do you say that the company had ceased to do any business at all?]

It cannot perhaps be said that the company was doing no business at all; but all its machinery, and the greater part of its stock, had been destroyed by fire, its landlord was pressing for rent, the company was *in extremis*, and practically was not a going concern. And inasmuch as the effect of this transaction was not to enable the company to continue its business but to bring the business to an absolute standstill, it cannot be considered as one in the course of business, which must mean in the course of the ordinary business of the company as a going concern: *Yorkshire Railway Wagon Company* v. *Maclure* (1); *In re Panama, New Zealand, and Australian Royal Mail Company* (2).

Marten, Q.C., and *T. Ribton*, for the Defendant *Bayley*, and *Bramwell Davis*, for the official liquidator of the company, were not called upon.

The Defendant *Hanbury* did not appear.

COTTON, L.J.:—

This is an appeal from a decision of Vice-Chancellor *Bacon*. The ground on which the case was argued on behalf of the Plaintiff before the Vice-Chancellor was that the payment of the insurance moneys to the Defendants in respect of their claims against the company must be treated as a fraudulent preference within the 164th section of the *Companies Act*, 1862, which provides that any act relating to property which would in bankruptcy be a fraudulent preference of the creditors shall be considered as such in the winding-up of a company, so that money recovered under a claim on account of fraudulent preference would be recovered for the general creditors as if it had been recovered by the trustee in bankruptcy, and that therefore the moneys so paid to the Defendants must remain subject to the security of

(1) 21 Ch. D. 309. (2) Law Rep. 5 Ch. 318.

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the Plaintiff. The Vice-Chancellor held that the section did not apply, and dismissed the action so far as it related to this claim. I think he did so rightly, because the section is only intended to apply in the case of a winding-up and for the benefit of the general creditors. Here the Plaintiff is seeking to enforce his claim independently of the winding-up. And in the case of *Ex parte Cooper* (1) it was decided that the doctrine of fraudulent preference is not to be taken advantage of by a mortgagee, but only for the benefit of the whole body of creditors. That was a bankruptcy case. The 164th section relates only to a case similar in all respects to that which arises in bankruptcy. I think, therefore, that the decision of the Vice-Chancellor was right on that point.

That ground, however, has been abandoned before us, and here the case has been argued on a fresh ground. It has been said that the directors in dealing as they did were not acting in the course of the business of the company. In September, 1884, the works of the company and their plant and machinery and part of their stock were destroyed by fire. At that time there was a considerable sum of money due to *Bayley* and *Hanbury*. Shortly after the fire a meeting of directors was held, at which *Bayley* and *Hanbury* only were present, and a resolution was passed for commencing actions against the company to recover the sums of money due to them. This was done, and the sum of £3000 in the hands of the insurance company was attached under garnishee orders to answer the judgments for the payment of the debts due to the Defendants. It is unnecessary to give any opinion as to the conduct of the Defendants in this matter; the question is, whether they were acting in the course of the business of the company. Now the debentures provided that the charges thereby created should be floating securities, and that the company might in the course of its business deal with and dispose of the property charged in such manner as the company might think fit. The company of course means the directors, and the resolution complained of was passed at a meeting of directors at which a proper quorum was present; and fraudulent preference being out of the way, the question (as I have said) remains whether the transaction

(1) Law Rep. 10 Ch. 510.

was in the course of business. The Plaintiff here has not made out that the business of the company had stopped at the date of this transaction, although undoubtedly the company was at that time insolvent; and I think we must hold that until the presentation of the winding-up petition the business of the company was going on. That being so, this dealing must be considered to have taken place in the course of the business of the company, and therefore, independently of the 164th section, the Plaintiff's claim cannot succeed.

One other point has been raised. It was said that the borrowing powers of the directors had been exceeded, and that in estimating the amount of the paid-up capital the shares issued under a certain agreement ought not to be taken into consideration. But that contention could only be supported by referring to an agreement which was not put in evidence in the Court below; and the point not having been raised there, I do not think we ought to allow it to be raised here.

SIR J. HANNEN:—

I am of the same opinion. The case made at first of fraudulent preference being out of the way, the question remains whether this transaction was in the course of the business of the company. No doubt considerable prejudice has arisen as to this transaction from the circumstance that the two directors who acted in the matter were interested parties. But considering the transaction without prejudice, it appears to me that the question is whether or not the payment of a legitimate and just debt is in the course of the business of the company, and, so put, the question answers itself. I think it is in the course of business.

FRY, L.J.:—

I am of the same opinion. The whole question really resolves itself into one of the construction to be put upon the debentures of the company. By each of those debentures a charge is created upon the property of the company, and it is provided that the debentures shall be a floating security, and that the company may in the course of its business deal with and dispose of the property therein comprised in such manner as it thinks fit.

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Therefore the question is whether the payment of a just debt is a transaction in the course of business; and I am of opinion that it is. The appeal must accordingly be dismissed with costs.

Solicitor for Appellant: *F. H. Honey.*
Solicitor for Respondent *Bayley*: *E. Lee.*
Solicitors for Company: *Lindo & Co.*

W. W. K.

C. A. 1886 *Dec.* 1.

ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPORATION *v.* CROMPTON.

[1886 N. 231.]

Patent—Practice—Validity—Particulars of Objection—Nonconformity between provisional and complete Specifications—46 & 47 Vict. c. 57, s. 29.

Where the defendant in a patent action objects to the validity of the plaintiff's patent on the ground that there is a want of conformity between the provisional and complete specifications, it is not sufficient for him to state in his particulars of objection that the invention described in the complete specification is not the same as the invention described in the provisional specification: he must state in what the difference consists.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* made in Chambers.

The action was brought by the *Anglo-American Brush Electric Light Corporation*, who were the assignees of a patent taken out by *Herbert John Haddan* in 1878 for an invention, called "Improvements in apparatus for the generation and application of electricity for lighting, plating, and other purposes," to restrain the Defendants from infringing their patent.

The letters patent were afterwards amended and two disclaimers filed by the Plaintiffs in 1882 and 1885.

The Defendants in their defence denied both the validity of the patent and the infringement. In the particulars of objection to the validity of the patent filed by the Defendants they denied the novelty and utility of the patent and the sufficiency of the specification; and in the 5th paragraph of the particulars the Defendants said, "That the alleged invention described in the

complete specification as amended is a different invention from that described in the provisional specification."

The Plaintiffs took out a summons before Vice-Chancellor *Bacon* for further and better particulars, and his Lordship ordered them to file further and better particulars shewing "how and in what respect the alleged invention described in the fourth division, and claimed in the seventh claiming clause of the final and amended specification referred to in the statement of defence and particulars of objections delivered by the Defendants, is a different invention from that described in the provisional specification."

From this order the Defendants appealed.

J. G. Butcher, for the Appellants:—

The Defendants have done all that the law requires from a defendant in patent actions. The statute 46 & 47 Vict. c. 57, s. 29, enacts that a defendant must give particulars of the "grounds on which he disputes the validity of the patent," and it is only where he disputes it on the ground of novelty that he is bound to enter into details. Novelty is a question of evidence, and therefore it is thought reasonable that the plaintiff should know to what alleged facts he is to direct his evidence, but the nonconformity of the complete specification with the provisional is a question of law, and it was never intended that the defendant should set out the heads of the argument which he proposes to use. There is no reported case in which a defendant has been required to give details of this objection either under the old law or since the statute of 1883; but it would appear from the reports of *Foxwell* v. *Bostock* (1) and *Bailey* v. *Roberton* (2), where objections for nonconformity were considered, that no such particulars had been given in those cases. In *Heath* v. *Unwin* (3) Chief Baron *Abinger* says of the objection that the specification does not fully set forth the invention: "The Legislature never intended that the defendant should argue his case in the statement of objections which he delivers in compliance with the Act." The same principle applies to this objection.

(1) 4 D. J. & S. 298. (2) 3 App. Cas. 1055.
(3) 10 M. & W. 684, 687.

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J. C. Graham, for the Plaintiffs, was not called on.

COTTON, L.J.:—

I am of opinion that the Court ought not to interfere with the order of the Vice-Chancellor. With regard to the alleged want of conformity between the provisional and complete specifications, I have not had sufficient opportunity of studying them to understand what the objection really is. But it is clear that a defendant who delivers particulars of objection is bound to give such information, and so to describe the object and scope of the objection as to tell the plaintiff what the nature of the case is which he has to meet. In the present case the Plaintiffs may have to adduce evidence to explain the meaning of the specification. I think that it is reasonable that the Defendants should give further and better particulars of this objection, not as the heads of the Defendants' intended argument, but to shew in what the alleged difference consists, so that the Plaintiffs may not be taken by surprise as to the case they are to meet.

BOWEN, L.J.:—

I agree.

Solicitors: *Goodhart & Medcalf; Renshaws.*

M. W.

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In re WADSWORTH.
RHODES *v.* SUGDEN.

[1882 W. 954.]

Solicitor's Lien—Property "recovered or preserved" in Action—Solicitor discharged before Trial—Charging Order under the Attorneys and Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28 [*Revised Ed. Statutes, vol. xiii., p.* 881] *—Action continued and concluded by new Solicitor—Costs.*

The solicitor who had acted for the Plaintiff in the institution and conduct of an action to establish his right to a sum of money was discharged by the client shortly before the trial. The action was continued by new solicitors on behalf of the Plaintiff, and judgment was delivered in favour of the Plaintiff ordering the Defendant to pay him the money. After the trial the former solicitor obtained, under the *Attorneys and Solicitors Act*, 1860, s. 28, a declaration of charge upon the sum recovered, "subject to the lien of the present solicitors of the Plaintiffs upon the said sum":—

Held, that the solicitor who was solicitor at the time the fund was recovered was entitled to a first charge thereon for all his taxed costs of the action, and subject thereto that the discharged solicitor was entitled to such lien as he obtained under his charging order.

Cormack v. *Beisly* (1) followed.

ADJOURNED SUMMONS.

This action was brought (*inter alia*) to establish the right of the Plaintiffs to have a sum of £278 14*s.* 1*d.* paid to them out of trust funds in the hands of the Defendant.

The writ was issued on the 1st of March, 1882, and the Plaintiffs delivered their statement of claim on the 23rd of March, 1882. The solicitor who acted for the Plaintiffs in the institution and conduct of the action, including the preparation of their evidence, was discharged by them on the 22nd of December, 1884; and the action was then continued by new solicitors, Messrs. *Lancaster & Wright*, on behalf of the Plaintiffs, and came on for trial on the 23rd of February, 1885, when judgment was given ordering (*inter alia*) the Defendant to pay to the Plaintiffs the £278 14*s.* 1*d.* they claimed, and the costs of so much of the action as related thereto.

The former solicitor then obtained, on the 1st of April, 1885,

(1) 3 De G. & J. 157.

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upon a summons taken out by him for the purpose, under the *Attorneys and Solicitors Act*, 1860, s. 28 (see *In re Wadsworth, Rhodes* v. *Sugden* (1)), a declaration that he was "entitled to a charge upon the sum of £278 14*s.* 1*d.* recovered in this action for his taxed costs, charges, and expenses of and in reference to this action as the solicitor of the Plaintiffs, subject to the lien of Messrs. *Lancaster & Wright*, the present solicitors of the Plaintiffs, upon the said sum."

The question subsequently arose whether the former solicitor of the Plaintiffs could claim to be paid his costs *pari passu* with or to any extent in priority to the costs of Messrs. *Lancaster & Wright*, the present solicitors of the Plaintiffs, either by virtue of his charging order or of his general lien on the fund actually recovered; and this question was raised by arrangement upon a summons to vary the Chief Clerk's certificate taken out by the Plaintiffs, with which the former solicitor was served.

Hastings, Q.C., and *Renshaw*, for the Plaintiffs, in support of the summons.

W. Pearson, Q.C., and *Oswald*, for the Defendant.

After judgment had been delivered upon the summons to vary:

Whitaker, for the former solicitor:—

The former solicitor, who conducted the greater part of the Plaintiffs' case, and was discharged almost upon the eve of the trial, has, in respect of his part of the costs, under his general lien as good a right as the present solicitors; and his costs accordingly, so far as the general lien is concerned, run *pari passu* with those of Messrs. *Lancaster & Wright*. In *Cormack* v. *Beisly* (2) the solicitor had discharged himself by arrangement with his client, and *Turner*, L.J., said that he must "be held to have abandoned his lien so far as was necessary to enable" the other solicitors "to conduct the cause to a conclusion." But even in that case the lien was only abandoned to that extent, and in the present case it was the client who discharged the solicitor, and under such circumstances if the cause is continued

(1) 29 Ch. D. 517. (2) 3 De G. & J. 163.

and carried to a conclusion by other solicitors the lien of the original solicitor remains: otherwise a client by discharging his solicitor on the very eve of a trial might get rid of his lien, although he was the solicitor to whose labours in fact the recovery of the fund was substantially due. In *Bozon* v. *Bolland* (1) Lord *Cottenham* treated the discharged solicitor as having a lien.

[KAY, J.:—That was because he had retained the client's papers.]

At all events the present solicitor is only entitled to such costs as he had incurred up to the moment of the former solicitor's charging order in priority to the former solicitor, for the expression "subject to the lien of the present solicitors" cannot give them any claim to be paid in priority to the former solicitor any costs that have been incurred after the date of the charging order.

Hastings, Q.C., and *Renshaw*, for the Plaintiffs:—

In *Bozon* v. *Bolland* the former solicitor had retained possession of the papers of his client, and that was the foundation of the decision, which does not affect the present question. *Cormack* v. *Beisly* (2) we claim as an authority in our favour, for the Vice-Chancellor, whose decision was confirmed by *Turner*, L.J., said that on principle the solicitor who last conducted the suit ought to take his costs first. Moreover, the charging order is in terms subject to the lien of the Plaintiffs' present solicitors. Therefore on all grounds the present solicitors are entitled to their costs in priority.

Whitaker, in reply.

KAY, J.:—

I think this matter has been decided, if not by me, on the former order, certainly by other Judges. The facts are shortly, as I understand them, these. The solicitor was employed for a certain time on behalf of the Plaintiffs to prosecute the action. The clients discharged him before the sum of money sought to be recovered in that action was actually recovered. Afterwards, the solicitors newly retained by the Plaintiffs carried

(1) 4 My. & Cr. 354. (2) 3 De G. & J. 157.

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on the action, and by the judgment a sum of money was ordered to be paid to the clients. Thereupon the former solicitor applied for a charging order and obtained it. I am told he obtained several charging orders on different funds, but I have only to deal with one of them. The charging order actually made was made in these terms. [His Lordship then read the order.]

The question now is whether the former solicitor can claim to be paid *pari passu* with the present solicitors either by virtue of his charging order, or by virtue, as it is now argued, of a lien which he had independently of the charging order on the fund actually recovered. If he had a lien independently of the charging order, I see no necessity for the expense of obtaining a charging order, and all the cost has been completely thrown away. But the matter came distinctly before the Court in the case of *Cormack* v. *Beisly* (1), where Lord *Hatherley*, then Vice-Chancellor, said (2): "It appears on principle that the solicitor who had last conducted the suit was the person who ought to take his costs first. Even if a solicitor were discharged by his client he could not insist upon continuing the suit in order that he might work out his lien, nor could he probably even then claim priority over the new solicitor who conducted the cause to an end." That is the very point. In the opinion of Lord *Hatherley*, the solicitor who is actually the solicitor at the time the fund is recovered has the first lien on the fund for his costs of that action; and, subject to that, this charging order of course would come in. I have had to say so often that I am tired of repeating it, that an order like a charging order is, for this purpose, in the nature of an execution, and a judgment creditor never takes anything except subject to prior equities; and whenever he gets his judgment, and however he gets it, execution of the judgment can only be obtained subject to any prior equity which attaches on the property. In my opinion I must follow this rule which seems to have been laid down by Lord *Hatherley*, and was not dissented from by the Judges of the Court of Appeal before whom the case came. There can be no hardship in it. If the first solicitor had conducted the case to trial and recovered the fund he would have

(1) 3 De G. & J. 157. (2) 3 De G. & J. 162.

been entitled to have a charge for all his costs of the action upon that fund. That is a lien given to him quite independently of any statute by the practice in Equity and also, I believe, at Common Law. If he is discharged, as Lord *Hatherley* points out, he could not compel the client to go on with the suit for the purpose of enforcing the lien. He is entirely at the client's mercy. If the client employs another solicitor why should not that solicitor have the first charge on the fund? It seems quite right; because the charge really only becomes effective when the fund has been recovered, and it is always subject to the chance whether the fund will be recovered or not. Of course, if the fund is sufficient to pay both, no question need arise; but if it is not, it seems quite fair that the solicitor who has conducted the action to a conclusion and has been the means of actually bringing the fund into the hands of his client by conducting the cause up to the point when the fund is recovered should have the first claim on the fund. It is said the first solicitor might have conducted the cause up to the moment before the hearing and the other solicitor might then have taken it up. What then? The proportion of the costs which would come to the solicitor who actually recovers the fund would probably be very small as compared with the costs of the other solicitor. I think the solicitor who was solicitor at the time the fund was recovered must have a first charge upon it for all his taxed costs of the action, and that subject to that the other solicitor will be entitled to such lien as he obtained under the charging order; and with reference to the costs of the application, I do not think fit to give any costs to anybody.

Whitaker then applied for leave to appeal.

KAY, J.:—I do not think I ought to give any such leave. You have made this application in the face of that very clear statement of the law by Lord *Hatherley*.

Solicitors: *Jaques, Layton, & Jaques*, agents for *Lancaster & Wright, Bradford*; *W. Easton*, agent for *W. Durnford, Halifax*.

W. W. K.

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Nov. 2.

In re BROOKSBANK.
BEAUCLERK *v.* JAMES.

[1886 B. 2696.]

Will—Exercise of supposed Power of Appointment—Non-existent Power—Election.

A testatrix entitled for life to property which in case of her death without issue (an event which happened) went over to her brothers and sisters, of whom *J.* was one, by her will, purporting to exercise a power, which she erroneously supposed herself to possess, appointed the property to a class consisting of certain named persons referred to in the will as objects of the power, of whom *J.* was not one, and by a codicil gave to *J.* certain property over which she had a free power of disposal:—

Held, that *J.* was put to his election whether he would take under or against the will.

ORIGINATING SUMMONS.

At the time of the death of *Elizabeth Bulmer* hereinafter mentioned certain personal estate stood limited in trust for her during her life, with a power for her to appoint it by will amongst her children by her first husband *William James*, and in default of appointment in trust for all her children by *William James*.

Elizabeth Bulmer died in July, 1852, having by the joint operation of her will and of a codicil thereto appointed the property in equal shares amongst her children by *William James* upon their respectively attaining the age of twenty-one, or, being daughters, marrying, with a direction that in case any of them should die without leaving issue his or her share should be equally divided amongst the others.

Mrs. *Susannah Brooksbank*, a widow, was one, and *James James* was another of the children of *Elizabeth Bulmer* by *William James*. After the death of *Elizabeth Bulmer* two deeds of family arrangement were executed by all her children by *William James*.

By the first of these deeds, which was dated the 25th of October, 1853, the shares of the children were settled upon them for their respective lives with reversion to their issue, and with a power for such of them as should die without issue to appoint his or her share to any child or more remote issue of *William James*.

This first deed was never acted upon. By the second deed, which, as it was admitted, was substituted for the first and bore date the 10th of January, 1854, it was, amongst other things, declared that Mrs. *Brooksbank's* share should be held in trust for her for her life with power to dispose of it by deed or will, subject, however, to the direction in the codicil to the will of *Elizabeth Bulmer* that in case any of the children of *Elizabeth Bulmer* should die without leaving issue, his or her share should be divided amongst the others of them.

At the date of the will hereinafter mentioned of Mrs. *Brooksbank*, her interest under the will of *Elizabeth Bulmer* as modified by the deed of 1854 was represented by certain funds standing in Court in an action of *James* v. *Galland* (1876 J. 155) to a separate account entitled "The account of *Susannah Brooksbank* for life with remainders over." The order under which the funds were paid into this account also directed payment of the dividends to Mrs. *Brooksbank*, but she was not a party to the action of *James* v. *Galland*, and was not before the Court when this order was made. However, after the funds had been paid into Court she applied for payment of the dividends to her, and she received the same down to the time of her death. It had been determined by the Court in another action that she had no interest in or power over the fund after her death.

Mrs. *Brooksbank* made her will dated the 12th of September, 1883, and therein, after giving legacies to various persons, some of whom were grandchildren or more remote issue of *William James*, and as such objects of the power of appointment conferred by the deed of 1853, proceeded as follows: "Pursuant to the power given to me by the will of my late mother *Elizabeth Bulmer*, deceased, I appoint the funds now standing in the Chancery Division of the High Court of Justice, and all other the stocks and funds now subject to my power of appointment under the said will upon trust for such of the several persons hereinbefore named as legatees as are objects of and within the scope of my power of appointment, such appointed funds to be accepted by such legatees on account of and in part satisfaction of the legacies hereinbefore given to them." And the testatrix gave and appointed all the real and personal estate which she was competent

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either in respect of interest or by force of any power or otherwise to dispose of, and which was not by her will otherwise disposed of, to her trustees upon trusts which were in effect trusts for her great nephew *Tom James* (an infant), but in case he should die under twenty-one then over.

By a codicil dated the 19th of August, 1884, Mrs. *Brooksbank* gave property, over which she had a free power of disposal, to her brother *James James*, who was not one of the persons named as legatees in the will, but was one of the persons entitled to the fund in Court which the will purported to appoint.

Mrs. *Brooksbank* died without having had any issue on the 29th of July, 1885, and the question having arisen whether her will and codicil did not raise a case of election as against *James James*, an originating summons was taken out by her executors and trustees in order to have that question determined, and was adjourned into Court.

Decimus Sturges, for the executors and trustees of Mrs. *Brooksbank* :—

A case of election is raised against *James James*. He is one of the persons who on the death of Mrs. *Brooksbank* is entitled to a share in the fund in Court under the codicil of *Elizabeth Bulmer* as one of "the others" of the children.

The will of *Elizabeth Bulmer* contained no power of appointment, nor had Mrs. *Brooksbank* any power whatever over the *corpus* of the fund, yet, whether by design or mistake is unimportant, Mrs. *Brooksbank* has affected by her will to give away property to which *James James* is entitled; and if he takes under that will he must give up his interest under the will of *Elizabeth Bulmer* or make compensation.

[KAY, J., referred to *Whistler* v. *Webster* (1).]

Whistler v. *Webster* is in point. For the purpose of election there is no difference between property and power: *Blacket* v. *Lamb* (in which *Whistler* v. *Webster* was approved) (2); *Cooper* v. *Cooper* (3); *Theobald* on Wills (4).

(1) 2 Ves. 367, 370.
(2) 14 Beav. 482.
(3) Law Rep. 7 H. L. 53.
(4) 3rd Ed. p. 81.

[KAY, J., referred to *Wollaston* v. *King* (1).]

H. Burton Buckley, for *James James*:—

The Court will no doubt aid the defective execution of a power, but here there was, *ex concessis*, no power at all; so this will must be read as if this attempted exercise of a non-existent power were altogether struck out of it. And it is the rule that the intention of a testator to dispose of property which does not belong to him must appear upon the face of the will itself, and is not to be collected from extrinsic evidence: *Clementson* v. *Gandy* (2).

There can be no election in favour of a non-existent class, nor in favour of persons whom the testatrix did not intend to benefit by the disposition which gives rise to the question. The only person who can benefit by election in this case is the residuary legatee under the will. In *In re Warren's Trusts* (3) it was held that an appointment in a will being *ex facie* void, the will must be read as if it contained no appointment, and that the persons entitled in default were not put to their election between the interests they took in that way and the benefits given to them by the testatrix out of her own property. [He also referred to *In re Wheatley* (4); and

KAY, J., referred to *In re Vardon's Trusts* (5).]

KAY, J.:—

In my opinion this case raises a question of election. It was decided long ago in *Whistler* v. *Webster* (6) by the Master of the Rolls, Sir *R. Pepper Arden*, that when a person purports under a power of appointment to give property which is the subject of the power to persons who are not objects of the power, that is to say, in fact, to exercise a power which he has not got; that if to the person who would be defeated by that gift free disposable property belonging to the testator is given by the same instrument that raises a case of election. I have always understood that when a person coming to claim under an instrument says, if it be a will, "pay me the legacy," or "hand over to me the particular

(1) Law Rep. 8 Eq. 165.
(2) 1 Keen, 309.
(3) 26 Ch. D. 208.
(4) 27 Ch. D. 606, 612.
(5) 31 Ch. D. 275.
(6) 2 Ves. 367.

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property given to me by that instrument," the executors have the right to say "you must conform to all the provisions of the instrument." And if the instrument also disposes, or purports to dispose, of property which belongs by paramount title to the person claiming under it, a case of election arises, and he cannot take under it the benefit which it gives him unless he is prepared to fulfil the gift which it purports to make of his own property. In short the rule may be stated in this form, that no one can take under and against the same instrument, but taking under it is bound to fulfil all its provisions.

Now let us see whether the facts here raise any case of that kind. [His Lordship then stated the will and codicil of *Elizabeth Bulmer*, and continued:] Two deeds were executed after the death of Mrs. *Bulmer* by family arrangement, in both of which Mrs. *Brooksbank* joined. By the first of these a power of appointment was given to Mrs. *Brooksbank* over the share which she took under the will and deed; but the second deed, which was inconsistent with the first, and which, as I understand, was accepted by Mrs. *Brooksbank* as a substitution for it, did not contain any such power of appointment. The effect was that Mrs. *Brooksbank* in fact had no power of appointment over the fund, whatever it was, derived under the will of *Elizabeth Bulmer*. But Mrs. *Brooksbank*, mistaking what her rights and powers were, when she made her own will affected to dispose of this fund derived under the will of *Elizabeth Bulmer*, or her share of it, in this way. [His Lordship then read the clause in the will of Mrs. *Brooksbank* purporting to exercise the power of appointment, and continued:—] It is proved, and I have a right to know, that the only fund to which she could possibly be referring in this clause was a fund derived under the will of *Elizabeth Bulmer* and which was standing in the Chancery Division of the High Court of Justice; and it is quite plain that she had not any power of appointment under the will of *Elizabeth Bulmer*. But she had a power under the first deed of family arrangement executed after the death of *Elizabeth Bulmer;* and supposing that power existed there would be no difficulty in referring these words to that power, and this might be a perfectly good exercise of that power. Therefore, so far as the words refer to the power under the will and not to the power

under the deed, I think the Court is bound to correct them by treating them as a reference to the power under that deed, which is only necessary for the purpose of making certain the objects of the appointment. Now that would be, supposing the power had been an existing power, a complete disposition of her share of this fund, so that it would be given, as I understand, entirely away by the effect of this disposition in the will.

In point of fact she had no such power, and at the moment of her death her share went over to *James James* and certain other persons. To *James James*, by the codicil to this will, she gives free disposable property of her own. It seems to me that the Court is bound to treat the whole will and codicil taken together as being an attempt by the testatrix to dispose of *James James's* interest; that is to say, his interest in the testatrix's share of her mother's property—to appoint that away to other persons while by the same instrument she gives free disposable property of her own to *James*. That seems to me to raise a case of election. I do not think that I am entitled to look into that further than is involved in that statement. I do not know which Mr. *James* elects to take, but supposing he comes to ask for that property which was given to him by this will or codicil and does not give effect to the whole instrument, the answer to him must be, "A case of election is raised. You must choose whether you will take under or against the will, as the will affects to deal with property belonging to you and at the same time gives you property belonging to the testatrix."

Now, in answer to that, two cases have been cited. One is *In re Warren's Trusts* (1), where an appointment was made under a power, but it being a special power the appointment was so made as to be void for remoteness; and although (I am using the phrase which is very well-known in this doctrine of election) "free disposable property" of the testator was given to the person who was entitled in default, it was held it did not raise a case of election because the whole appointment being void it must be treated as being struck out of the will. Of course I cannot sit in judgment on that authority. The only thing I can say is, that is not the case now before me. Then in *In re*

(1) 26 Ch. D. 208.

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Wheatley (1) a perfectly different consideration arose. In *In re Vardon's Trusts* (2) it was decided by the Court of Appeal that when you found a particular intention on the face of the instrument which was inconsistent with the general intention, the particular intention must prevail; on that I say nothing except that I am bound by the decision, and when a similar case comes before me I must follow it. But that is not this case. It seems to me that the facts here raise a simple case of election.

Solicitors: *Wordsworth, Blake, & Co.*

W. W. K.

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Nov. 16.

In re THOMAS.
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[1886. T. 658.]

Vendor and Purchaser—Contract to sell Real Estate—Death of Vendor before Completion—Defective Title to Part—Will—General Devise in Trust for Sale—Equitable Conversion—Dower—Gift to Wife of Income of Proceeds of Land—"Interest in Land"—Dower Act (3 & 4 *Will.* 4, *c.* 105), *s.* 9 [*Revised Ed. Statutes, vol. vii., p.* 619].

A testator, having entered into a contract for the sale of real estate to a purchaser, died before completion. By his will he devised all his real estate to trustees for sale, and out of the proceeds to invest £1000 and pay the income thereof to his widow. He then gave various other legacies out of the proceeds, but made no disposition of the ultimate residue. After the testator's death it was found that no title could be made to a material part of the property comprised in the contract, and thereupon the trustees of the will rescinded the contract:—

Held (1), that the contract did not effect an equitable conversion of any of the property comprised therein; and (2), that the gift to the widow of the income of part of the proceeds of the real estate was a gift to her of an "interest in land" within sect. 9 of the *Dower Act*, 3 & 4 Will. 4, c. 105, and that, therefore, she was not entitled to dower out of any part of her husband's estate.

ADJOURNED SUMMONS.

On the 23rd of April, 1883, *David Morgan Thomas* entered into a contract in writing with *William Jenkins* for the sale of his, *Thomas's*, share in certain freehold and copyhold farms, lands, houses, in the county of *Monmouth*, and in a house called

(1) 27 Ch. D. 606. (2) 28 Ch. D. 124; and on appeal, 31 Ch. D. 275.

"*Berthllwyd*," in the county of *Brecon*, for £3000, £5 being paid by *Jenkins* to *Thomas* by way of deposit. *Thomas* died on the 27th of January, 1884, without having completed the contract. By his will dated the 22nd of January, 1884, he appointed the Defendants, *John Charles Howell* and *Rees John Thomas Rhys*, his executors and trustees, and then proceeded as follows: "I give, devise, and bequeath unto my said trustees all my property of what nature or kind soever upon trust to convert the same into money, and after payment of all my just debts, funeral and testamentary expenses, to invest £1000, part thereof, at their discretion, and pay the income arising from such investment to my wife *Jennett* during her life," but upon her death he directed his trustees to divide the £1000 equally between three persons named. He then gave various further legacies out of the proceeds, but there was no ultimate disposition of the residue.

After the testator's death it was ascertained that he had no title to, or that no sufficient title could be made to, a house in the county of *Brecon* called "*Berthllwyd*," forming a material part of the property comprised in the contract: and after some fruitless negotiations with *Jenkins* to induce him to accept a conveyance of the testator's share in the other property comprised in the contract, the trustees, acting under the advice of counsel, rescinded the contract and put up the testator's share in such other property for sale by auction, when it was bought by *Jenkins* for £2500.

In addition to the property comprised in the last contract the testator had other real estate, all of which was sold by the trustees.

The testator left his widow, *Jennett Thomas*, surviving him, but he never had any issue. His estate was far more than sufficient to pay his debts and legacies.

Questions having arisen in the administration of the estate, this action was commenced by originating summons, by the widow against the trustees, and *Morgan Thomas*, the heir-at-law, to have them decided; and, if necessary, for administration.

The first question was, whether the contract of the 23rd of April, 1883, had the effect of converting the property comprised in it into personal estate.

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Millar, Q.C., and *Hadley*, for the Plaintiff, the widow:—

We submit that the contract was one binding upon the testator himself, and one which the purchaser could have enforced against him with compensation, that is, abatement of the purchase-money, in respect of that part of the property comprised in it to which no title could be made. If, then, there was a binding contract at the death, there was conversion in Equity: *Buckmaster* v. *Harrop* (1).

Marten, Q.C., and *E. Ford*, for the Defendant, the heir-at-law:—

To effect a conversion in Equity the contract must have been valid in every respect—a contract binding on both parties: *Lysaght* v. *Edwards* (2). It was only capable of being enforced against, not by, the vendor: *Dart's* Vendors and Purchasers (3).

Millar, in reply, cited *Fry* on Specific Performance (4); *Hudson* v. *Cook* (5).

Upjohn, for the Defendants, the trustees.

KAY, J. (after stating the facts, continued):—

The question is whether the contract of the 23rd of April, 1883, operated as a conversion of the property comprised therein into personal estate. There can be no doubt that if it was a binding contract it would operate as a conversion, and what took place after the testator's death would be immaterial. In the course of the proceedings which were taken after his death to carry out the contract, it appeared that the house called "*Berthllwyd*" was a house to which the testator could make no title, and the result was that the trustees of the will, acting upon the advice of counsel, abandoned the contract, treating it as one which could not be enforced against the purchaser, and the property which did belong to the testator has since been sold under a new contract altogether. Under the circumstances I assume it to be the fact that what the trustees did was properly done in

(1) 7 Ves. 341.
(2) 2 Ch. D. 499, 507.
(3) 5th Ed. p. 262.
(4) 2nd Ed. § 449.
(5) Law Rep. 13 Eq. 417.

every respect; that is to say, they were satisfied that this house called "*Berthllwyd*" was such a material part of the property agreed to be sold, that the purchaser could not possibly have been forced to take the rest if they could not make a title to the house.

It is said that there is a rule in Equity that where a vendor has entered into a contract for the sale of property to a portion only of which he can make a title, he can be compelled to convey that portion, and to make compensation in respect of the rest. Whether such a rule would apply to this case, I do not consider. There may be such a rule in Equity where the purchaser comes for specific performance, but this is rather by way of alteration than performance of the contract. The question in the present case is whether there was a binding contract. The point arose before the late Master of the Rolls, in the case of *Lysaght* v. *Edwards* (1), though no doubt under different circumstances. The question there was whether by virtue of a contract for the sale of real estate the property became converted in Equity, so that the vendor, who died before completion, was only a trustee of the property, and whether it therefore passed under a devise of trust estates in his will. That is obviously only a different mode of trying the same question. Here, if the contract was valid, and there had been a devise of trust estates, the property would have passed by the devise. The Master of the Rolls says this:—[His Lordship then read part of the judgment commencing, "The position of the vendor is something between what has been called a naked or bare trustee" (2), down to "and therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in Equity" (3), and proceeded:—] And further on (4) he says this: "If, on the other hand, the title, being bad and not having been accepted, was in such a state at the time of his death that the purchaser was entitled to refuse the estate, then there was not a valid contract to sell; there was nothing which would have been binding upon the testator's heir, under the doctrine of constructive conversion; and then the testator would have been entitled to the real estate, to the freehold estate

(1) 2 Ch. D. 499.
(2) Ibid. 506.
(3) 2 Ch. D. 507.
(4) Ibid. 515.

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free from any contract at all, because the contract he had entered into was not binding."

If I may respectfully say so, that is a statement of the doctrine in which I entirely concur; and therefore, in this case, the title being bad at the time of the testator's death, and not having been accepted by the purchaser in the testator's lifetime nor since his death, and the contract itself having been rescinded because of its invalidity, I am of opinion that the contract did not effect any conversion of the estate in Equity.

The next question was whether the testator's widow was entitled to dower out of so much of his undisposed residue as represented the proceeds of real estate. She had married the testator since the *Dower Act*, 3 & 4 Will. 4, c. 105.

Millar, Q.C., and *Hadley*, for the Plaintiff, the widow:—

The undisposed of proceeds of sale arising from real estate belong to the heir, and are liable to dower.

Marten, Q.C., and *E. Ford*, for the Defendant, the heir-at-law:—

This question is disposed of by the *Dower Act*, 3 & 4 Will. 4, c. 105, which says (sect. 9), "That where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will." A gift by the husband to his widow, as in the present case, of the income of the proceeds of land devised in trust for sale, is a gift of "an estate or interest in land:" *Lacey* v. *Hill* (1).

Millar, in reply:—

The *dictum* of the late Master of the Rolls in *Lacey* v. *Hill* was not necessary for the decision of the case. If that were the principle, it would follow that a legacy of, say £5, out of the proceeds of land, would deprive the widow of her dower out of real

(1) Law Rep. 19 Eq. 346, 350.

estate, perhaps, of immense value. I submit that a "contrary intention" under sect. 9 of the *Dower Act*, is indicated by the devise in trust for conversion into money: it shews an intention on the part of the testator that none of his property shall be considered as real estate.

Upjohn, for the trustees.

KAY, J:—

In this case the married woman was married since the *Dower Act*, and she being, as I assume, entitled to dower out of her husband's estate, he, by his will, disposed of his estate by the words "all my property of what nature or kind soever," upon trust to convert, and after payment of his debts, "to invest £1000 part thereof," and pay the income to his wife during her life. And then he gave various legacies, but did not make any disposition of the residuary proceeds of sale. Therefore, by the well-settled doctrine of the Court, these residuary proceeds, so far as they were derived from real estate, belonged to the heir. The question is whether the widow is entitled to dower out of that part of the estate which descended to the heir, or out of any part of her husband's real estate. That depends upon the language of the *Dower Act*, which says (sect. 9): "That where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will." Now, I do not see any contrary intention here; this intention must be declared by the will. It is said that the trust to convert the real estate into money suffices to indicate a contrary intention. No authority has been cited in support of that proposition, and in my opinion it does not.

The question, then, is, whether the testator has left any land to his widow, "or any estate or interest therein to or for the benefit of his widow." The word "interest" is used obviously by way of distinction from the word "estate," and means something less than "estate." The testator has left his whole property in trust

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to convert and to pay the income of £1000, part of the proceeds, to his widow. The widow, therefore, has a right to come to the trustees and say, "If there is not enough personal estate to provide for this legacy, you must sell the land and set aside my £1000." It is impossible, then, to say that this is not an "interest in land." An interest in the proceeds of land sold is an "interest in land," in contradistinction to an "estate in land." Apart from all authority the point is quite plain: but the case is not without authority applicable to it, because the late Master of the Rolls, says this in *Lacey* v. *Hill* (1), "Now, it is said or suggested that giving real estate upon trust to sell and giving the widow part of the proceeds even in the shape of a part of the capital, or of any income of the proceeds to be invested," —that is exactly what has been done here—"is not a gift of an estate or interest in the land for the benefit of the widow. I am of opinion that it is."

I am, therefore, clearly of opinion that in this case the widow is not entitled to dower out of any part of her husband's estate.

Solicitors: *I. H. Wrentmore*, agents for *A. Curtis & Son, Neath; Schultz & Son*, agents for *Morgan & Rhys, Pontypridd; Gosling & Co.*

G. I. F. C.

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1886
Nov. 19, 20.

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[1886 P. 2143.]

Practice—Motion for Attachment—Notice of Motion—Affidavits—Service—"Address for Service"—Irregularity—Setting aside Proceedings—Objections—Rules of Supreme Court, 1883, *Order* IV., *r.* 1; XII., *r.* 10; LII., *r.* 4; LXVII., *r.* 2; LXX., *rr.* 1, 3—*Sitting at "Royal Courts of Justice"—Sitting in Chambers.*

It is irregular under Rules of Supreme Court, 1883, Order LII., r. 4, not to serve with a notice of motion for attachment copies of the affidavits intended to be used on the motion: the copy affidavits, and the notice should be served together, and, if not served personally, at the address for service: Order IV., r. 1; XII., r. 10; LXVII., r. 2.

An irregularity committed in the course of any proceedings under the Rules of the Court does not necessarily render the proceedings void:

(1) Law Rep. 19 Eq. 346, 350.

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under Order LXX., r. 1, the Court has power to condone the irregularity. Therefore, where an order for attachment for contempt of Court had been made against a Defendant on a motion the affidavits in support of which had not been served with the notice of motion, as required by Order LII., r. 4, the Court, being satisfied that a contempt had been committed, refused, in the exercise of the discretion conferred upon it by Order LXX., r. 1, to set it aside; but under the circumstances the Defendant, who was in prison under the attachment, was ordered to be released.

Hampden v. *Wallis* (1) and *In re Wyggeston Arbitration* (2) considered.

A summons or notice of motion to set aside proceedings for irregularity should state the several objections on which the applicant intends to insist: Order LXX., r. 3.

A Judge is sitting "at the *Royal Courts of Justice*" when he is sitting in any part of the building, whether in Chambers or in open Court.

THIS action, which was for an injunction to restrain the Defendant from carrying on a business, was commenced by writ issued out of the Central Office of the *Royal Courts of Justice*. The Plaintiff and Defendant were both resident at *Nottingham*, the Defendant being a person of humble position. Appearance was duly entered for the Defendant by Messrs. *Johnson & Weatherall*, of No. 7, *King's Bench Walk, Temple*, as agents for Mr. *Briggs* of *Nottingham*, his solicitor, the Defendant's address for service on the record being the office of Messrs. *Johnson & Weatherall*.

On the 22nd of September, 1886, the Vacation Judge granted an interim injunction against the Defendant on the application of the Plaintiff, and this order was served on the Defendant personally at *Nottingham* on the 4th of October.

On the 16th of October the Plaintiff's solicitors served Messrs. *Johnson & Weatherall*, as agents for the Defendant's solicitor, with a notice that the Court would be moved "at the *Royal Courts of Justice* on Wednesday, the 20th day of October, 1886," before the Vacation Judge on behalf of the Plaintiff that he might be at liberty to issue a writ of attachment against the Defendant for an alleged breach of the injunction, and the notice was received by the Defendant himself on the 17th of October. The notice of motion did not contain any statement of the Plaintiff's intention to read affidavits in support.

Wednesday, the 20th of October, was the day on which, in the

(1) 26 Ch. D. 746. (2) 33 W. R. 551.

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ordinary course, the Vacation Judge would sit in Court for the despatch of business in the Chancery Division.

At the sitting on the previous Wednesday, the 13th of October, the Vacation Judge stated that as all the pressing Chancery business had been disposed of there would be no further vacation sittings in Court, but that on the 23rd of October (Saturday) he would attend in Chambers in the Queen's Bench Division, when he would take any Chancery cases that might arise of a pressing nature.

On the following day, the 14th of October, an announcement appeared in the newspapers that there would be no further vacation sittings, and that the Vacation Judge "would only be in attendance at Queen's Bench Judges' Chambers on Wednesday in next week (October 20th)"—a mistake for "Saturday, October 23rd," and nothing being said as to "Chancery business."

On the 23rd of October the motion for attachment was made before the Vacation Judge in Chambers (the Defendant not appearing), when he made the order, and on the 25th of October the Defendant was lodged in *Nottingham Gaol.*

The evidence adduced to the Judge in support of the motion consisted of two affidavits which had been filed on behalf of the Plaintiff, but copies of these affidavits were not served on the *London* agents of the Defendant's country solicitor with the notice of motion, though they were received through the post on the same day, the 16th of October, by the country solicitor.

Upon his imprisonment the Defendant presented a petition to the Lord Chancellor, supported by an affidavit of poverty, praying that the necessary steps might be taken under the statute 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, to effect his release and to enable him to conduct his defence to the action. In his petition, after alleging that he had a good defence to the action, the Defendant admitted having disobeyed the interim injunction, but stated that he had been misled by the announcement in the newspapers, otherwise he would have attended in person and explained his circumstances and submitted himself to the Court.

The Defendant now moved by leave that the order and writ of attachment "might be set aside as irregular," and that he might be discharged from custody "on the ground that the evidence in

support of the application for the said order of attachment was never served with the notice of motion for such order, and on other grounds sufficient to avoid the said order;" and that he might be discharged on the ground that he had been misled by the announcements in the newspapers.

Oswald, for the Defendant:—

It was clearly irregular not to serve the affidavits with the notice of motion: Rules of Supreme Court, 1883, Order LII., r. 4, and therefore the order of attachment obtained under such circumstances should be discharged.

Swinfen Eady, for the Plaintiff:—

As the Defendant had two clear days' notice of the motion, the Court will, under Order LXX., r. 1, disregard any objection on the ground of irregularity: *Hampden* v. *Wallis* (1); *In re Wyggeston Arbitration* (2). Service of the notice of motion upon the solicitors on the record of the Defendant was in fact sufficient, and it was unnecessary to serve him personally: *Browning* v. *Sabin* (3).

Oswald, in reply:—

In *Hampden* v. *Wallis* and *In re Wyggeston Arbitration* the objection on the ground of irregularity was taken by way of preliminary objection before any order was made on the motion; but in the present case, the order having been actually made, it is too late to ask the Court to condone the irregularity. Again, in those cases both the affidavits and notice of motion were served at the proper address for service; whereas, in the present case, the notice of motion was served at one place, the address for service, and the affidavits at another place not the address for service. Order LXVII., rule 2, renders it obligatory on a defendant to give an address for service; and Order XII., rule 10, makes the service of writs, notices, &c., at the address for service sufficient. Service must be either personal or at the address for service; there is no other course: *Daniel's* Chancery Practice (4). Again, it was irregular not to mention the affidavits in the notice

(1) 26 Ch. D. 746.
(2) 33 W. R. 551.
(3) 5 Ch. D. 511.
(4) 6th Ed. vol. i. pp. 46, 47.

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of motion; the place, also, and date at which the Court would be moved, and at which the order was actually made, are not sufficiently stated in the notice of motion. The defendant, a countryman in humble life, had no means of knowing where "the *Royal Courts of Justice*" were, or, when he got there, in what part of the building the Judge would hear the motion.

KAY, J.:—

Upon the main question, as to whether the service of the affidavits was so irregular as to vitiate the order of attachment made upon them, I will reserve my judgment, but I may say at once that I do not accede to the objection that the place at which the motion would be made was insufficiently stated in the notice of motion. A Judge sitting in any part of this building is, as a matter of fact, sitting "at the *Royal Courts of Justice*": it is not necessary that he should be sitting in one of these Courts. He may sit, just as I do, in Chambers, in a room: where a Judge is in the habit of transacting a large amount of important business. It is idle to say that the notice of motion did not contain a sufficient intimation as to where the Judge would be sitting, for any one, on inquiry of the attendants at the *Royal Courts of Justice*, would be told in what part of the building he was sitting.

Then it was said that the notice of motion was defective in not stating that the *Royal Courts of Justice* were in the "*Strand, London.*" In my opinion that is an argument of despair.

It certainly appears to me that this Defendant has not been over-punished: his conduct will not bear defence; he has been guilty of an act of disobedience to an order of the Court. People, whether poor or rich, must understand that the orders of the Court must be obeyed *simpliciter*, and that ignorance cannot be pleaded as an excuse for a moment.

The only real question, therefore, is one of practice—whether the affidavits in support of the motion for attachment were duly served. On this point I will consult the Registrar.

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This case I reserved for consideration on the sole point of practice which arises in it. An application was made to discharge

a prisoner, who had been under an order committed for contempt, on the ground that the evidence used in support of the motion for attachment was never properly served, "and on other grounds sufficient to avoid the said order."

The simple facts are these: The Defendant had on the record the name of his solicitor in the country and the name of his agents in *London*, and his address for service in *London*. The notice of motion for committal was served at the office of the Defendant's *London* agents, his address for service in *London*. The office copies of the affidavits in support of the motion were not served with the notice of motion, but they were served on the same day, that is to say, two clear days before the motion could come on, upon the solicitor, or at the office of the solicitor, in the country. Upon the facts, such as I understand them to be, the office of the agents in *London* was the proper address for service; so that it is true that the affidavits and the notice of motion were not served together, and were not served in the same manner, because the notice of motion was served in one place, being the address for service, and the affidavits were served at the office of the solicitor in the country, which was not the proper address for service.

The Orders of the Court which relate to the matter are these: First of all, Order LII., rule 4, says that "Every notice of motion to set aside, remit, or enforce an award, or for attachment, or to strike off the rolls, shall state in general terms the grounds of the application; and where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion." I pause there for a moment. The Order means what it says; and it is, therefore, irregular when the affidavits are not served with the notice of motion.

Two cases have been cited, *Hampden* v. *Wallis* (1) and *In re Wyggeston Arbitration* (2), in order to shew that there was no irregularity in not serving the affidavits with the notice of motion.

In my opinion neither of those cases support that argument. All that was decided in those cases was this—that, although,

(1) 26 Ch. D. 746. (2) 33 W. R. 551.

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under Order LII., rule 4, an irregularity had been committed, yet under another Order, namely, Order LXX., rule 1, the Court had power to condone the irregularity. That was all those cases decided; they did not decide that it was no irregularity to serve the affidavits separately from the notice of motion; and in my opinion it is undoubtedly an irregularity not to serve the affidavits with the notice of motion.

The question then arises whether, after an order of attachment has been made, the Court has any power whatever to deal with an irregularity of that kind. I will consider that in a moment.

The only other Order relating to the matter is Order LXVII., rule 2, which says, "All writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications in respect of which personal service is not requisite shall be sufficiently served if left within the prescribed hours, at the address for service of the person to be served as defined by Orders IV. and XII., with any person resident at or belonging to such place." Order IV., rule 1, says, "In all cases where a writ of summons is issued out of the Central Office"—which, I understand, was the case here—"the solicitor of a plaintiff suing by a solicitor shall indorse upon the writ and notice in lieu of service of a writ the address of the plaintiff, and also his own name or firm and place of business, and also, if his place of business shall be more than three miles from the principal entrance of the Central Hall at the *Royal Courts of Justice*, another proper place, to be called his address for service, which shall not be more than three miles from the principal entrance of the Central Hall at the *Royal Courts of Justice*, where writs, notices, pleadings, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him. And where any such solicitor is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor."

Therefore, if the agent on the record has his address within the three miles, that will be the only proper address for service.

Order XII. refers (rules 8, 9 and 10) to the case of "a defendant" only. Rule 8 says that a defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum

with the name of his solicitor. Rule 9 says that a defendant shall on the day he enters an appearance give notice of it by serving a notice at or posting it to the plaintiff's solicitor's address for service; and rule 10 says that "The solicitor of a defendant appearing by a solicitor shall state in such memorandum his place of business, and, if the appearance is entered in the Central Office, a place, to be called his address for service, which shall not be more than three miles from the principal entrance of the Central Hall at the *Royal Courts of Justice*." That applies to the agents of the Defendants, who state that their place of business is within three miles of the *Royal Courts of Justice*.

There is another order which I may mention as containing the rules as to pleadings. Order XIX., rule 10, says: "Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor; but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer."

I should mention Order LXVII., rule 4, which says that where no appearance has been entered for a party, or where a party or his solicitor, as the case may be, has omitted to give an address for service as required by Orders IV. and XII., writs, &c. may be served by filing them with the proper officer.

These are the main provisions, I think, with reference to the service and delivery of pleadings.

Having regard to these provisions I am clearly of opinion that in the present case an irregularity has been committed.

Then the next question is whether the Court has power to condone that irregularity.

It is answered "No—the Court has no such power;" and it is said that *Hampden* v. *Wallis* (1) and *In re Wyggeston Arbitration* (2) were cases in which the Court interfered before, and not after, the completion of the proceeding in which the irregularity had been committed; and the suggestion is that after completion the Court has no such power of condonation. That depends upon the language of Order LXX., rule 1, which is this: "Non-compliance

(1) 26 Ch. D. 746. (2) 33 W. R. 551.

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with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void"—that is to say, proceedings which have been taken—"unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit." To my mind those words are open to no possible doubt. They do undoubtedly refer to proceedings already completed but which have been irregular through non-compliance with some of the rules; and the only question is whether such proceedings, which are not in themselves void, are to be "set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit."

I have no doubt that the meaning of the rule is—that the Court or Judge may, after an irregular proceeding has been taken, as in this case, either set it aside for irregularity or amend it, or otherwise deal with it as the Court shall think fit; but it is not to be treated as void. Therefore, I am compelled by this rule to say that the order for committal in the present case was not void, and that the power of the Court to deal with it is settled by Order LXX., rule 1. That this is so is plain from rule 2 of the same Order, which says that "No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity." That shews plainly enough that Order LXX. applies to an application to set aside a past proceeding for irregularity. Then rule 3 says that "Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion." So that in this case, if the notice of motion does not state the several objections to be insisted upon, the applicant cannot rely upon them, and the Court cannot be asked to set aside the order of committal for irregularity. Now, the only objection stated in this notice of motion is that the affidavits were not served with the notice of motion; but the other objections now insisted on are not so stated.

I hold that service of the affidavits on the country solicitor was

not good service at all; consequently I will not construe the case too strictly against the applicant.

But in this case the Defendant has been guilty of a contempt of Court for which he deserved to be imprisoned. Much has been said to me about the liberty of the subject, but I have not much respect for the liberty of a subject who deserves to be in prison.

In proceedings for attachment the Court will look at the regularity of the proceedings more strictly, perhaps, than in any other, and will not allow advantage to be obtained by an irregularity: if any such irregularity is brought to its attention the Court is not bound to proceed to attachment.

Upon the whole I am of opinion that the order of attachment is not void; but there has been an irregularity in obtaining it, and therefore under Order LXX., rule 1, the Court may set it aside, or amend, or otherwise deal with it in such manner and upon such terms as the Court shall think fit. Acting under that power I do not set aside the order. In the exercise of the discretion conferred upon me I shall now release the Defendant from prison, but shall make no order for costs as against the Plaintiff.

Solicitors: *Torr, Janeways & Co.*, agents for *Wells & Hind, Nottingham*; *Johnson & Weatherall*, agents for *J. W. Briggs, Nottingham.*

G. I. F. C.

KAY, J.

1886.

Nov. 22, 26.

JARRETT *v.* HUNTER.

[1885 J. 1212.]

Vendor and Purchaser—Contract—Specific Performance—Statute of Frauds—"Vendor"—Name of "Vendor's Solicitor"—Solicitor himself the Vendor—Insufficient Description.

If, in a contract for sale, the vendor is described simply as "proprietor," "owner," "mortgagee," or the like, the description is sufficient to satisfy the requirements of the *Statute of Frauds*; but not so if he is described as "vendor," or "client" or "friend" of a named agent, or as "solicitor to the vendor," even where the solicitor is himself the vendor and is described in the contract as "*A. B.* solicitor to the vendor."

A mere reference in a condition of sale to a conveyance or other document of title relating to the property, the name or description of the vendor not being stated in the condition, is not sufficient to import its contents into the contract so as to satisfy the requirements of the *Statute of Frauds*, even if such conveyance or other document does shew who is the vendor.

A contract which, under the *Statute of Frauds*, is invalid through not naming or sufficiently describing the vendor, is not rendered valid by the fact that the purchaser knew, at the time he entered into the contract, who the vendor was.

On the 4th of May, 1885, two copyhold cottages at *Sunderland*, of which the Plaintiff *Edward Nelson Jarrett* was the trustee and legal owner, and the Plaintiff *George Stephenson Lawson*,—who was his solicitor—the equitable and beneficial owner, were put up for sale by auction in separate lots, each lot being described by itself in a separate copy of printed particulars, but the conditions of sale and form of contract printed with each copy of particulars being identical in both cases. The conditions described the person selling as "the vendor," and named "*George Stephenson Lawson*" as "the vendor's solicitor."

The 4th condition was in these words: "That the vendor shall within seven days from the day of sale deliver to the purchaser, or his or her solicitor, an abstract of the title to the said property, and shall deduce a good title thereto, commencing with a ground conveyance from Messrs. *Tillman & Cordner*, the ground owners."

The lots were knocked down to the Defendant, *Robert Hunter*, who thereupon signed the contract upon each copy of the parti-

culars and conditions of sale. Each contract was, *mutatis mutandis*, in the following terms:—

"Memorandum that *Robert Hunter* hath this day been declared the purchaser of the premises mentioned in the conditions and particulars of sale hereunto annexed at the sum of £115, and that he has paid into the hands of the therein named *George Stephenson Lawson* the sum of £2 10*s.* as a deposit and in part payment of the purchase-money; and the said *G. S. Lawson*, as the solicitor for the vendor, and the said *R. Hunter*, do hereby respectively agree to and with each other to complete the sale agreeably to the said conditions."

Each contract was signed by *Lawson* simply as "*G. S. Lawson*," without the addition of the word "vendor."

The Defendant having repudiated the contracts, the Plaintiff brought this action for specific performance, and the action now came on for trial.

It was proved that at the sale *Lawson* informed *Hunter* that he was the beneficial owner of the property.

The other facts in the case are stated in his Lordship's judgment.

The question was whether the contracts were in compliance with the *Statute of Frauds*.

Bradford, for the Plaintiffs:—

I do not dispute the law as laid down in *Sale* v. *Lambert* (1), and *Potter* v. *Duffield* (2), and other cases, that the term "vendor" is not sufficient to satisfy the requirements of the *Statute of Frauds*, but that the name or description of the vendor must appear. Here the name of *Lawson*, who was the vendor of, at all events, the beneficial ownership, does appear. It is true that *Lawson* is described, not as "the vendor," but as "the solicitor to the vendor:" that is a mere inaccuracy in the description which is not enough to vitiate the contract. It is sufficient if the name of the vendor can be in any way gathered from the contract: *Commins* v. *Scott* (3). I submit I am entitled to refer to the

(1) Law Rep. 18 Eq. 1. (2) Law Rep. 18 Eq. 4.
(3) Law Rep. 20 Eq. 11.

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conveyance and the other deeds mentioned in the 4th condition, in itself part of the contract, in order to shew who "the vendor" is. Here the purchaser who had employed *Lawson* as his solicitor knew that he was the vendor.

E. J. Elgood, for the Defendant:—

It is clear from the authorities that there is not sufficient identification of the vendor in the contract. The mere mention of a deed in the conditions is not sufficient to shew who are the contracting parties. Parol evidence is not admissible to shew who was the vendor.

Bradford, in reply.

1886. Nov. 25. KAY, J. (after reading the contract and the 4th condition, continued):—

Evidence has been given, which I admitted only so far as it shewed what facts were known to the purchaser at the time, that when he paid the deposit before signing the contracts *Lawson* told him that he was himself the beneficial owner of the property. The Defendant seems to have engaged *Lawson* to act as his solicitor; but, objecting to pay the charges of the corporation of *Sunderland* for paving the street in front of the premises, which by the conditions he was liable to pay, he afterwards put the matter into the hands of another solicitor, who, on the 12th of May, 1885, wrote denying that there was any contract, and asked for the return of the deposit.

The law on this subject at present is this:—If the vendor is described in the contract as "proprietor," "owner," "mortgagee," or the like, the description is sufficient, although he is not named; but if he is described as "vendor" or as "client" or "friend" of a named agent, that is not sufficient; the reason given being, in the language of Lord *Cairns*, that the former description "is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the *Statute of Frauds* can arise:" *Rossiter* v. *Miller* (1); *Sale* v. *Lambert* (2); *Potter* v. *Duffield* (3); the reason against the latter description

(1) 3 App. Cas. 1124, 1141. (2) Law Rep. 18 Eq. 1.
(3) Law Rep. 18 Eq. 4, 8.

being that, in order to find out who is vendor, client, or friend, you must go into evidence on which there might possibly, as in *Potter* v. *Duffield*, be a conflict, and that, says the late Master of the Rolls in the last-named case, "is exactly what the Act says shall not be decided by parol evidence." "I should be thrown," he continues, "on parol evidence to decide who sold the estate, who was the party to the contract, the Act requiring that fact to be in writing."

But it is urged that the defect is cured in this case by the fact that *Lawson's* name does appear in the contract; and it is said, though that has not been proved, that he signed a duplicate on behalf of the vendor. However, the contract, so far from representing him as the vendor, mentions him as "solicitor for the vendor;" from which any one would infer, not that he was the vendor, but that the vendor was some other person. It is impossible to know that he was the vendor without parol evidence, which for that purpose is inadmissible.

Next it is urged that the defect is cured by the 4th condition, which refers to certain deeds which, when examined, would shew a grant of the premises to the Plaintiff *Jarrett*; but how that would shew that *Lawson* was the vendor has not been explained, even if the grant had been to *Lawson*. The conveyance there mentioned is in January, 1879: it is stated in the 4th condition to be the commencement of the title, not a conveyance to the vendor; and I am not aware of any authority for holding that the contents of a conveyance referred to in the conditions are to be imported into the contract, even if it did shew who was the vendor, which this conveyance does not.

Finally, can the fact that the Defendant knew who was the vendor make a contract which is invalid under the *Statute of Frauds*, because it does not name or sufficiently describe the vendor, into a valid contract in this respect? It is quite obvious that it cannot do so. To hold otherwise would in effect decide that a parol contract might be enforced if the party sued knew all the facts required by the statute to be in writing.

I am therefore obliged, with regret, to yield to this objection, and I must dismiss the action, but the evidence is important on

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the question of costs. I am of opinion under the circumstances that the action should be dismissed without costs.

Solicitors: *Hickin & Graham*, agents for *G. S. Lawson, Sunderland; Stocken & Jupp*, agents for *C. R. Walker, Sunderland.*

G. I. F. C.

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1886
Nov. 16, 29.

In re MILLS
MILLS *v.* MILLS.

[1886 M. 2236.]

Will—Special Power of Appointment, Exercise of—General Devise—Residuary Devise—Specific Gift.

The question whether, since the *Wills Act*, a special power of appointing real estate is exercised by a general devise, where the testator had neither at the date of his will nor of his death any real estate of his own, is one of intention to be inferred from the words of the will and from the surrounding circumstances at the date of it, particularly the enlarged operation given by the Act to a general devise. A testator making a mere general devise, though having no real estate of his own, does not thereby sufficiently indicate an intention of exercising a special power of appointing real estate, notwithstanding that objects of the power happen to be included among the devisees.

THOMAS MILLS, who died in 1865, by his will dated in 1860, devised certain real estate to trustees upon trust for his widow for life, and then for his son *William Braithwaite Mills* for life, and after his death for such one or more of his children or other issue born in his lifetime as he, the son, should by deed or will appoint; and, in default, upon trust for the son's children equally.

The widow died in 1880.

William Braithwaite Mills, by his will, dated the 13th of November, 1884, after appointing trustees and executors, and giving his furniture and other household effects to his wife absolutely, proceeded as follows: "I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees upon trust," to sell and convert and out of the proceeds to pay his funeral and testamentary expenses, debts and legacies,

and to pay the income of a sum of £7000, part of such proceeds, to his widow while she remained unmarried, with remainder, as to the capital, in trust for his children by her, or their issue, as his wife should appoint, and, in default, in trust for his children by her who being sons should attain twenty-one or daughters attain that age or marry, in equal shares. And the testator further directed his trustees to hold the sum of £3500 in trust for his daughter *Helena*, and the remainder of the residuary trust funds in trust for his son *John Harker Mills*, but if he should die before attaining twenty-five, then for such child or children of *John H. Mills* as should survive him and being sons attain twenty-one or daughters attain that age or marry, and if no such child then for the testator's other children in equal shares. Then followed a direction settling the shares and interests of his daughters, including the £3500, for their separate use without power of anticipation, with remainders to their children as they should appoint, and in default, to such children.

W. B. Mills died on the 9th of January, 1886, leaving surviving him his widow and four children, namely, his son *John Harker Mills* and daughter *Helena Mills*, both by a former wife, and two daughters by his present widow. Neither at the date of his will nor at his death had he any real estate of his own.

The question was whether the general devise in *W. B. Mills'* will operated as an exercise of the special power of appointment given him by the will of his father, *Thomas Mills*.

To have this question decided, the trustees of the will of *Thomas Mills* took out an originating summons against the widow, children, and trustees of the will of *W. B. Mills*, for a declaration whether the latter will did or did not execute to any and what extent the power given to *W. B. Mills* by the former will, and who were now beneficially entitled to the property the subject of the power; and how the costs of the application should be provided for.

C. Cree, for the Plaintiffs.

Ingle Joyce, for the Defendant, *John Harker Mills*:—

I submit that the general devise in *W. B. Mills'* will operated as a good execution of the power.

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It is a settled rule of law that in wills before the *Wills Act* (1 Vict. c. 26), a general devise of real estate would pass real estate over which the testator had a power of appointment, where he had no real estate of his own: *Standen* v. *Standen* (1). In the analogous case of personal estate before the *Wills Act*, in *Theobald* on Wills (2) the same view seems to be taken of a general gift, and this is supported by the observations of Lord *St. Leonards* in his judgment in *Lake* v. *Currie* (3), where he says that the intention of the statute "was to extend and not to narrow the operation of devises, and therefore to hold that cases which before the statute would have been an execution are not so now would be contrary to the whole scope of the Act." In cases cited in support of the contrary proposition, there was, as pointed out in *Theobald* on Wills, some personal estate besides that subject to the power. As to the effect of the *Wills Act* upon modern wills, I submit that it was not one of its objects to make that which would have been a good exercise of a power before the Act inoperative after the Act. A residuary devise is specific.

[KAY, J.:—That has been decided by *Lancefield* v. *Iggulden* (4).]

So here the testator, having no real estate to dispose of other than that subject to the power, makes, in effect a specific devise of that property.

B. B. Rogers, for the Defendants, the younger children, and the trustees of *W. B. Mills'* will:—

Before the *Wills Act* it was necessary to find an intention to exercise a power; there must have been some reference either to the power or to the property subject to the power: *Sugden* on Powers (5). By the *Wills Act* the intention is not required as to general powers, but special powers are left untouched in this respect; and therefore as regards the exercise of a special power, it is still necessary to find a reference either to the power or to the property. In the present case, there is clearly no reference to the power: the question, then, is, Is there a reference to the

(1) 2 Ves. 589; 6 Bro. P. C. 193.
(2) 3rd Ed. p. 164.
(3) 2 D. M. & G. 536, 548.
(4) Law Rep. 10 Ch. 136.
(5) 7th Ed. vol. i. p. 369.

property? There is none. The testator, *W. B. Mills*, merely uses general words to prevent intestacy; and then the gift is in part only to persons objects of the power. The question arises on the fact that *W. B. Mills* had no real estate of his own at the date either of his will or of his death. I admit that, prior to the *Wills Act*, this fact would have been sufficient to make the general devise operate as an execution of the power. The rule was that if the words could by no conceivable state of events have any operation at all at the testator's death except by construing them as an execution of the power, they must be so construed: *Sir Edward Clere's Case* (1); *Buckland* v. *Barton* (2). The expression "real estate" seems to have been considered a sufficient reference to the property subject to the power, if the testator had no other. But a different rule prevails as to personal estate, whether before or since the *Wills Act*: in that case a distinct reference to the power, whether general or special, or to the property, has always been necessary: *Nannock* v. *Horton* (3); *Webb* v. *Honnor* (4); *Walker* v. *Mackie* (5); *Innes* v. *Sayer* (6); *In re David's Trusts* (7); *Mattingley's Trusts* (8). The same rule, I submit, prevails in the present day both as to real and personal estate. In *Lake* v. *Currie* (9); *Jarman* on Wills (10); the question was whether, having regard to sects. 24 and 27 of the *Wills Act*, a general devise could now operate as an exercise of a general power, and Lord *St. Leonards* held that the old law was not restricted by the Act.

Ingle Joyce, in reply:—

It is admitted that, had this will been executed before the *Wills Act*, it would have operated as an exercise of the power. Why should it not do so now?

In *Hawkins* on Wills (11) it is stated that the old rule that a special power is executed by a general devise "is unaffected by the *Wills Act*," and *Lake* v. *Currie* (12) is cited as supporting

(1) 6 Rep. 17 b.
(2) 2 H. Bl. 136, 139.
(3) 7 Ves. 391.
(4) 1 Jac. & W. 352.
(5) 4 Russ. 76.
(6) 3 Mac. & G. 606.
(7) Joh. 495.
(8) 2 J. & H. 426.
(9) 2 D. M. & G. 536.
(10) 4th Ed. vol. i. pp. 687–8.
(11) Page 26.
(12) 2 D. M. & G. 547.

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that proposition. Under sect. 24 of the *Wills Act*, the will should be construed as if it actually described the property as at the testator's death.

1886. Nov. 29. KAY, J.:—

The short question in this case is whether a special power of appointing real estate among children or issue is exercised, since the *Wills Act*, by a general devise of real estate where the appointor at the date of his will had no real estate of his own?

[His Lordship then stated the facts and continued:—]

There is no reference in the son's will to the power of appointment or to the property comprised in it; but at the date of the will, and also at the time of his death, he had no real estate of his own. He left children by a former wife, besides children of the wife mentioned in his will.

It is argued that before the *Wills Act*, 1 Vict. c. 26, this would have been an exercise of the power, because at the date of the will he had no other real estate, and the general devise in the will under the old law must therefore be treated as if it had been a devise of the particular real estate which was the subject of the power.

But it is said, on the other hand, that the reason for this was because otherwise that devise could have no possible operation, whereas, this will being since the *Wills Act*, the testator might have acquired real estate of his own after the date of the will which would pass by such a devise.

The case of personal estate under the old law, it is suggested, could never be precisely analogous, because it could hardly happen that a testator could at the time of his will be without some personal estate. However, it is certain that under the old law a general bequest of personal estate would not operate as the exercise of a power of appointment of personal property, even where it was clear that at the date of the will the bequests in it could not be satisfied out of the testator's own personal estate. Parol evidence of that fact was not admissible: *Jones* v. *Tucker* (1); *Jones* v. *Curry* (2).

In *Nannock* v. *Horton* (3), where the testator had power to

(1) 2 Mer. 533. (2) 1 Sw. 66. (3) 7 Ves. 391, 399.

appoint £4000 stock by will, he, by his will, gave various sums of stock. Lord *Eldon* in his judgment contrasts the case of personal estate thus: "Every gift of land, even a general residuary devise, is specific. Only that, to which the party is entitled at the time, can pass. But, as to personal estate, he may give that, which he has not, and never may have; and at all events whatever he may happen to have at his death will pass. He might have had stock, before he died; though he might have had none at the date of the codicil."

It is strange that the question should not have been determined, but counsel have not cited, nor can I find, any decision precisely in point.

It is purely a question of intention. Did the testator intend to exercise his power? *Bennett* v. *Aburrow* (1); *Denn* v. *Roake* (2).

The intention of a testator can only be inferred from the words of his will, and from the circumstances which at the time of executing it were known to him, and which the Court, putting itself in his place, is bound to regard.

Here, at the date of his will, the testator had no real estate. By his will he in general words gives "all my real and personal estate." Power and property are completely distinct; and if he had at that time any real estate it is clear the power would not have been exercised. The other principal facts bearing upon the question of his intention are these. The will contains a gift out of the bulk of the proceeds of his real and personal estate to his wife, who was not an object of the power, and a direction out of the same fund to pay funeral and testamentary expenses and debts, which could not be done out of the property subject to this special power. The provisions for issue of children are not confined to issue born in his lifetime, to whom alone under the terms of the power he could make a valid appointment. All these are indications which tend to prove that it was not his intention to exercise this special power. *Doe* v. *Bird* (3) shews that such indications ought to be regarded.

Besides, I must suppose him acquainted with the law which enabled him by a general devise to pass real estate he might

(1) 8 Ves. 609, 615. (2) 6 Bing. 475.
(3) 11 East, 49.

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acquire after the date of his will: in fact most people, I suppose, are now aware of this. It is the intention at the date of his will which must be considered. If the power was exercised by this general devise, any real estate acquired by the testator afterwards would also pass, unless that general devise could be read as refering exclusively to the property subject to the power, which, since the *Wills Act*, seems impossible.

But the cases under the old law shew plainly that, if the devise did operate upon property belonging to the testator, general words such as these would not exercise a power. The reason for holding that such words did exercise the power was, that otherwise they could not have any operation. Under the old law a general devise never both passed property of the testator and also exercised a power, unless that was shewn to be the intention by some other indication.

The language of Chief Baron *Alexander* in the House of Lords in *Denn* v. *Roake* (1) is this: "I may venture to say, that in no instance has a power or authority been considered as executed unless by some reference to the power or authority, or to the property which was the subject of it, or unless the provision made by the person entrusted with the power would have been ineffectual—would have had nothing to operate upon, except it were considered an execution of such power or authority."

Sir *William Grant* in *Bennett* v. *Aburrow* (2) says that the intention may be collected from other circumstances than an express reference to the power, "as, that the will includes something the party had not otherwise than under the power of appointment; that a part of the will would be wholly inoperative, unless applied to the power."

It is impossible to say that a general devise is wholly inoperative if it passes real estate acquired afterwards; and if it might have that operation when made, it is difficult to treat it as wholly ineffectual because the testator at the date of his will had no real estate. Certainly it would at least be potentially operative. You could not say it "would be wholly inoperative."

A testator well-advised, though he had no real estate at the time of making his will, and though he desired not to exercise a

(1) 6 Bing. 478. (2) 8 Ves. 609, 615.

special power, might still wish to insert in his will a general devise of real estate.

Perhaps the case which most nearly touches the point is *Mattingley's Trusts* (1), in which it was decided that under the new law a special power to appoint stock among children was not exercised by appointment of "my money in the funds," although the testator at the date of the will had no stock of his own; because, as the Vice-Chancellor said, if it were held that those words pointed to a specific fund, it would follow that they would not pass any after-acquired property of that description.

That is to say, the words which are read as exercising the power in the case of personal estate must be such as refer to the property comprised in the power exclusively, and would not be operative upon after-acquired personal estate.

This was precisely the reason why a general devise of real estate under the old law effected the execution of a power where the testator had no real estate at the time. The will was read as though it contained a specific devise of the real estate which was the subject of the power, and that specific devise of course could not, under any circumstances, pass any other estate.

Speaking for myself, I have the strongest objection to anything like a general rule for discovering intention. To say that, wherever a testator making a will since the *Wills Act* has no real estate at the date of his will, that testator shall be taken to have intended by a general devise to exercise a special power over real estate, would to my mind be so unreasonable as to be irrational. I believe that such a rule would defeat the intention at least as often as it would effectuate it.

There being no such decision upon a will made since the *Wills Act*, the former authorities are not precisely in point; and I feel emancipated from any restriction they might put upon my judgment.

The far better and safer rule, in my opinion, is in each case to consider and weigh the words of the particular will and the surrounding circumstances at the date of it, amongst which the enlarged operation of a general devise is a most important one.

It has been suggested that the *Wills Act* shews an intention

(1) 2 J. & H. 426.

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rather to extend the operation of wills in exercising powers—at least as to general powers, which by sect. 27 are to be considered as exercised by a general devise or bequest unless a contrary intention appear by the will—and that therefore a special power should be still treated as exercised in all cases where it would have been so treated under the old law. The argument involves a fallacy. If the reason for presuming the intention of the testator to exercise the special power is taken away by other provisions in the Act, the presumption ceases; and the fact that general powers are specially provided for affords no indication that the Act intended to preserve the presumption as to the exercise of special powers when it destroyed the reason for that presumption.

On the best consideration I can give in this case, to the words of the will, and to the circumstances of the testator at the time, I do not believe he intended to exercise this special power. If not exercised the property would go in default amongst all his children: it is reasonable to suppose he desired not to disturb that provision. I believe either that he forgot all about the power or that he desired not to exercise it. If he forgot the power but intended to pass the property subject to it, possibly that might be sufficient; but I cannot find anything to satisfy me that this was his intention.

The burden of proof is on those who assert affirmatively that the power was exercised: the Court must be satisfied of this by sufficient evidence. I am not so satisfied. The inclination of my opinion is that the testator did not intend to exercise this special power.

The costs will come out of the general residue of the testator's estate.

Solicitors: *Cree & Son*, agents for *Watson, Newby, & Robson*, and *W. H. Mills, Stockton-on-Tees.*

G. I. F. C.

EXCHANGE AND HOP WAREHOUSES, LIMITED *v.* ASSOCIATION OF LAND FINANCIERS.

NORTH, J.
1886
Nov. 2.

[1883 E. 323.]

Foreclosure Judgment—Staying Accounts and Inquiries under Judgment.

Order made staying until further order, with liberty to apply, the prosecution of accounts and inquiries directed by a judgment in the nature of a foreclosure judgment (unless the Defendants would give security for the costs of the proceedings), on the ground that it was shewn to be highly probable that the amount due to the Plaintiffs would greatly exceed the value of the property, and that the costs of further proceedings would be thrown away.

SUMMONS by the Plaintiff company to stay the further taking of the accounts and inquiries directed by the judgment at the trial of the action on the 22nd of June, 1885, on the ground that proceedings under the judgment would be useless and expensive.

The action was brought against the Defendant company (which was in liquidation) and their liquidators, claiming (*inter alia*) the rescission of a contract which the Plaintiffs had, on the 18th of July, 1881, entered into for the purchase, for £15,100, of the property and business of the Defendant company (which were subject to mortgages for £75,000), and of a subsequent conveyance and assignment to the Plaintiffs. The judgment at the trial declared that the sale ought to be set aside, and that the agreement for purchase, and the subsequent conveyance and assignment, were void, and ordered the sale to be set aside accordingly, and that the agreement and the conveyance and assignment should be respectively cancelled; and it was ordered that the Plaintiffs should recover against the Defendant company the sum of £15,100 in respect of the purchase-money of the property. And it was ordered that the following accounts should be taken: (1) an account of interest paid by the Plaintiffs upon the incumbrances upon the property, and of moneys paid by them in or towards the redemption of any such incumbrances, and of interest on all moneys so paid; (2) an account

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of moneys expended by the Plaintiffs in repairs and lasting improvements of the property, and in the outgoings thereof, and in carrying on the business; (3) an account of costs, charges, and expenses paid or incurred by the Plaintiffs in consequence of the purchase. And it was ordered that the Defendant company should pay to the Plaintiffs what should be found due to them on taking these accounts. And it was ordered that an account should also be taken of the rents, profits, and income of the property and business received by the Plaintiffs, and a set-off was directed of what should be found due from the Plaintiffs on this account against what should be found due to them on the former accounts, and it was ordered that the Defendant company should pay to the Plaintiffs what should be certified to be due to them. And an inquiry was directed what contracts and engagements properly entered into by the Plaintiffs in carrying on the business were subsisting. And it was ordered that the Defendant company should indemnify the Plaintiffs against all liability in respect of such subsisting contracts and engagements. And it was declared that the Plaintiffs were entitled to a lien on the property and the goodwill of the business for the £15,100, and for what upon taking the above accounts should be certified to be due to them from the Defendant company, and for anything which the Plaintiffs might be compelled to pay in respect of the subsisting contracts and engagements, and that, upon discharge of the lien, the Defendant company would be entitled to a reconveyance and reassignment of the property and business.

In support of the summons the Plaintiffs adduced evidence to the effect that the total sum due to the Plaintiffs on the taking of the accounts (including the purchase-money, interest, and costs), would, after making the set-off directed by the judgment, probably amount to £33,698. There was £70,000 principal remaining due on the mortgages, the total charge on the property being therefore £103,698, and the value of the property did not exceed £90,000. It was admitted that the only other assets of the Defendant company consisted of a sum of about £40. The Defendant company disputed the accuracy of the Plaintiffs' evidence as to the value of the property, and as to the probable result of the accounts.

Cozens-Hardy, Q.C., and *Upjohn*, for the summons:—

The evidence shews that the amount which will appear to be due to the Plaintiffs on the taking of the accounts directed by the judgment, and for which they will have a lien on the property, will, with the amount due on the prior mortgages, greatly exceed the value of the property. That being so, it would be simply throwing away money to go on with the taking and vouching the accounts, and under such circumstances the Court will stay further proceedings under the judgment. In *Taylor* v. *Mostyn* (1) the Court of Appeal were inclined to think (without actually deciding the point) that, on a substantive application by the plaintiff, the Court would stay the taking of the accounts under a foreclosure judgment, if it was satisfactorily shewn that the taking of them would be useless.

The judgment in the present case is in the nature of a foreclosure judgment, and the present application is made in accordance with the suggestion of the Court of Appeal in *Taylor* v. *Mostyn*. If the Defendants wish to ascertain the value of the property, they can apply for an order for sale under sect. 25 of the *Conveyancing Act*, 1881. At any rate the Plaintiffs ought not to be put to the expense of taking and vouching the accounts in Chambers.

Cookson, Q.C., and *Stokes*, for the Defendants:—

Taylor v. *Mostyn* does not apply. The application is premature. The Plaintiffs are in the position of mortgagees in possession. The Plaintiffs knew, and it was part of their case, that the Defendant company was insolvent, and yet they chose to take a judgment in this form. It is not clear from the evidence that the Defendants will not gain anything by redeeming the Plaintiffs; the *onus* is on the Plaintiffs to shew that they will not.

NORTH, J.:—

In my opinion this application ought to be granted. I think that in all probability the balance due to the Plaintiffs will considerably exceed the value of the property after satisfying

(1) 25 Ch. D. 48.

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the prior charges. The question is whether under these circumstances the accounts, which are directed by the judgment, ought to go on against the Defendant company who have no property but that which is the subject of this action, and a sum of about £40. The judgment having directed these accounts to be taken, I do not think that the Plaintiffs are entitled to say that the taking of them shall be stopped altogether, but I think they have the right to say that the accounts shall not be taken at their risk and expense. During the course of the argument I gave the Defendants the option of the accounts going on if they would give security for the costs of taking them. That offer was not accepted, and no security is forthcoming, and I do not think that the Plaintiffs ought to be compelled to go on with the taking of accounts, which will probably be of no use, and will only involve them in expense. Unless, therefore, the Defendants will give the security which I have suggested, I shall stay the taking of the accounts and the making of the inquiries until further order, reserving liberty to the Defendants to apply.

Solicitors for Plaintiffs: *May, Sykes, & Batten.*
Solicitors for Defendants: *M. Webb & Sons.*

W. L. C.

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[1886 H. 4059.]

Libel—Injury to Trade—Privilege—Malice—Erroneous Statement of Judgment in former Action—Injunction—Damages.

The Plaintiff, who traded as *R. H. & Co.*, and the Defendants, who traded as *R. H. & Sons*, were rival manufacturers of sail cloth. The Plaintiff had formerly been a partner in the Defendants' firm. In 1885 the Defendants brought an action against the Plaintiff, claiming (*inter alia*) an injunction to restrain him from representing his firm to be the original firm of *R. H. & Sons*. At the trial of the action *North*, J., dismissed it, without costs as to that issue, and with costs as to the other issues. *North*, J., was satisfied by the evidence that the then Defendant had never made any such representation, but that on two or three occasions one of his agents, without his knowledge or concurrence, had represented that the then Defendant's firm was the original firm. The then Defendant repudiated this as soon as he knew it, and at the trial he offered by his counsel to give an

undertaking that he would never make such a representation. *North*, J., desired that this undertaking should be inserted in the judgment; the Defendant assented, and it was accordingly inserted in the judgment drawn up by the Registrar. In 1886 the present Defendants distributed a printed circular, which stated that they were the original firm, and after giving the title of the former action, headed by the word "Caution," proceeded, "By the judgment the Defendant was ordered to undertake not to represent that his firm is, or that the Plaintiffs' firm is not, the original firm of *R. H. & Sons*. Messrs. *R. H. & Sons*, finding that serious misrepresentations were in circulation to their prejudice, felt themselves compelled to bring the above action":—

Held, that the circular contained an untrue statement of the effect of the judgment in the former action; that it was a libel injurious to the Plaintiff's trade; that it was not privileged; that the Defendants had published it maliciously; and that the Plaintiff was entitled to an injunction, with the costs of the action.

But, there being no evidence of damage to the Plaintiff, except his own affidavit that the publication of the circular was calculated to injure him, and had injured him, in his business, which, he said, had greatly fallen off since the issue of it; and the Plaintiff not having brought the action till three months after he knew of the publication of the circular, only £5 damages were awarded to him.

ACTION to restrain the publication of an alleged trade libel, and for damages.

The Plaintiff, *Richard Hayward*, who carried on business as *Richard Hayward & Co.*, was a manufacturer of sail cloth at *Crewkerne*, in *Somersetshire*. The Defendants, who carried on business as *Richard Hayward & Sons*, were also manufacturers of sail cloth at *Crewkerne*. The Defendants and their predecessors in business had carried on the business for nearly a hundred years. The Plaintiff was a member of their firm from 1853 to 1868, when his partnership with them was dissolved, and he afterwards carried on business alone. In 1885 the Defendants commenced an action (*Richard Hayward & Sons* v. *Richard Hayward* (trading as *Richard Hayward & Co.*) 1885. H. 566), against the present Plaintiff, by which they claimed an injunction to restrain him from publishing any circular or otherwise stating or representing that the business then carried on by him was a continuation of, or in any way connected with, the original business of *Richard Hayward & Sons*; from selling or attempting to pass off on the public his goods as goods manufactured by the then Plaintiffs; from infringing any of the then Plaintiffs' registered

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trade-marks; and from so conducting his business as to lead the public to believe that his business was the original business of *R. Hayward & Sons*, and appropriating and executing orders for goods sent to and intended to be executed by the then Plaintiffs.

The then Defendant, by his statement of defence, denied that he had ever endeavoured to represent his firm as being the original firm of "*Hayward*," or that he had succeeded in obtaining any orders which were meant for the then Plaintiffs, or that he had unfairly or illegally endeavoured to acquire their trade business.

This action was tried by Mr. Justice *North* in March, 1886. There was evidence that one of the then Defendant's agents had on two or three occasions represented that the Defendant was carrying on the business of the original firm of *R. Hayward & Sons*, but it appeared that this had been done without the knowledge or concurrence of the Defendant, and that he had repudiated it as soon as he knew of it.

In the course of the trial the Defendant by his counsel offered to give an undertaking that he would never in future make any such representation. Mr. Justice *North* dismissed the action with costs, except as to the alleged representation by the Defendant that he was carrying on the original business of *R. Hayward & Sons*, in which respect the action was dismissed without costs. In the course of the judgment which he then delivered, Mr. Justice *North* said, that he should require the then Defendant to do what he had offered to do, viz., to undertake not to represent that his firm was, or that the Plaintiffs' firm was not, the original firm of *Richard Hayward & Sons*.

The judgment as afterwards drawn up by the Registrar purported to be made on (*inter alia*) an undertaking by the then Defendant by his counsel "not to represent in any way or to any person that his firm is, or that the Plaintiffs' firm is not, the original firm of *Richard Hayward & Sons*, or that the Plaintiffs' firm does not represent the original firm."

In May, 1886, an exhibition was opened at *Liverpool* called the *International Exhibition of Navigation and Commerce*. At this Exhibition the (present) Plaintiff and the (present) Defendants

each had a stall for the exhibition of the goods manufactured by them respectively. The Defendants distributed at their stall a printed handbill or circular which was headed—

"RICHARD HAYWARD & SONS (THE ORIGINAL FIRM),

"*Sole makers of*

"THE ORIGINAL 'HAYWARDS' COKER CANVAS.'"

This circular contained the following paragraphs—

"CAUTION.

"In the High Court of Chancery,

"Before Mr. Justice *North*.

"*Hayward & Sons* (Plaintiffs) v. *Hayward & Co.* (Defendants).

"By the judgment the Defendant was ordered 'to undertake not to represent that his firm is, or that the Plaintiffs' firm is not the original firm of *Richard Hayward & Sons*.'

"Messrs. *Richard Hayward & Sons*, finding that serious misrepresentations were in circulation to their prejudice, felt themselves compelled to bring the above action."

The Defendants commenced distributing this circular at the Exhibition early in June, 1886, and continued to do so during the course of the Exhibition. On the 25th of October, about a fortnight before the close of the Exhibition, the writ in this action was issued, claiming (1) an injunction to restrain the Defendants from issuing or distributing the circular then being distributed by them at the *Liverpool* Exhibition, purporting to contain a quotation from the judgment of Mr. Justice *North* in the action of *Hayward & Sons* (Plaintiffs) against *Hayward & Co.* (Defendants), or any other circular or advertisement containing an unfair report of the judgment of Mr. Justice *North* in the said action to the prejudice of the Plaintiffs; (2) damages and costs.

The Plaintiff moved for an interlocutory injunction, and by arrangement the motion was treated as the trial of the action.

The Plaintiff deposed that the publication of the circular "is calculated to injure, and has, in my opinion, injured me in my business, which has greatly fallen off since the issue of it." And in another affidavit the Plaintiff said, "the continued distribution

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of large quantities of the circular at the *Liverpool* Exhibition, and the evident intention of the Defendants to use the circular as a standing advertisement, is so injurious to my business and to the reputation of the goods manufactured by me, that I have been compelled to bring the present action." This was the only evidence of damage to the Plaintiff's business. It appeared from the evidence that the Plaintiff was aware of the distribution of the circular at the Exhibition as early as the 20th of June, but that (with the exception of a casual conversation between his solicitor and a member of the Defendants' firm) he had not taken any proceedings against the Defendants, or made any complaint to them, until the issue of the writ.

Mr. *J. H. Philp*, one of the partners in the Defendants' firm deposed that the Plaintiff, or his agents, had caused to be circulated, immediately after the former trial, amongst persons engaged in the trade, a copy of a newspaper, called *Pulman's Weekly News*, of the 6th of April, 1886, containing a short report of the trial, which the deponent said was an unfair report. His firm considered that the report was circulated to injure them in their business, and, under these circumstances, their circular now complained of was issued in self-defence.

Cozens-Hardy, Q.C., and *Maidlow*, for the Plaintiff:—

The Defendants' circular contains a garbled account of the judgment at the former trial; it is not true that the Plaintiff was "ordered" then to give such an undertaking. He voluntarily offered to give the undertaking, and in substance he succeeded in that action. It was only because of the conduct of one of his agents (without his knowledge) that he was deprived of a part of the costs.

The publication of an account of the judgment in an action is privileged only if it is a fair and accurate report published *bonâ fide* and without malice: *Macdougall* v. *Knight* (1). It is libellous to pick out a part of a judgment and publish it, even if that part is accurately stated, when the effect of doing so is to misrepresent the result of the action. As to damages, it is not necessary for the Plaintiff to shew that any individual customer,

(1) 17 Q. B. D. 636.

or intending customer, has been prevented from coming to him. It is sufficient to prove, as he has done, a general falling off in his business: *Harman* v. *Delany* (1); *Ingram* v. *Lawson* (2); *Rose* v. *Groves* (3); *Riding* v. *Smith* (4); *Evans* v. *Harries* (5); *Ashley* v. *Harrison* (6).

Napier Higgins, Q.C., and *Willis Bund*, for the Defendants:—

(1.) The circular does not contain a libel. The statement contained in it is true in fact. It is not pleaded that it was made falsely and maliciously. There was no malice in fact, and malice in law cannot be inferred. It was proved at the trial of the former action that the then Defendant had by his agent made representations that his firm was the original firm of "*Hayward*," and the judgment was based on his undertaking not to make such a representation again. If he had not given the undertaking, an injunction would have been granted against him. Though the judgment as drawn up does not expressly order the Defendant to give the undertaking, your Lordship in delivering judgment said that you should require him to do so.

(2.) The publication of the circular is privileged, and no malice is shewn: *Macdougall* v. *Knight* (7); *Lewis* v. *Levy* (8). The Defendants were entitled to protect their business after the misrepresentations which had been made by the Plaintiff. If a man succeeds in one issue out of five in an action he is entitled to tell the public this, without saying, I failed in the others. The Plaintiff circulated a newspaper which contained an inaccurate report of the trial of the former action. It made no reference to the finding of the Court that the Plaintiff's agent had made misrepresentations. This is a justification of our circular: *Western Counties Manure Company* v. *Lawes Chemical Manure Company* (9). We are entitled to let the public know that the Plaintiff's firm is not the original one: *Halsey* v. *Brotherhood* (10).

(3.) The Plaintiff has not proved that any injury has been done to his business by our circular. He only says that his business

(1) 2 Str. 898.
(2) 6 Bing. N. C. 212.
(3) 5 Man. & G. 613, 618.
(4) 1 Ex. D. 91.
(5) 1 H. & N. 251.
(6) 1 Esp. 48.
(7) 17 Q. B. D. 636.
(8) E. B & E. 537.
(9) Law Rep. 9 Ex. 218.
(10) 15 Ch. D. 514.

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has fallen off since the publication of the circular. This is probably due to the fact that, by reason of his undertaking in the former action, he is unable now to represent that his firm is the original one. The falling off in the business is not the necessary and natural result of the circular: *Evans* v. *Harries* (1); *Riding* v. *Smith* (2). The delay of the Plaintiff in commencing the action after he knew of the distribution of the circular also tends to shew that he has suffered no serious damage.

Cozens-Hardy, in reply:—

The statements in the circular are most injurious to the Plaintiff's trade. They are not true, and are not privileged. The evidence of damage is sufficient. There has been nothing like acquiescence by the Plaintiff.

NORTH, J. (after stating the facts, continued):—

The Plaintiff complains of the Defendants' circular as being a libel upon him and injurious to him in the trade which he carries on, and the first question I have to decide is, whether it is a libel upon him in the carrying on of his trade? In my opinion it is, because it imputes to him the doing in his trade of that which is fraudulent and dishonest, and which, if he had done it, would certainly be prejudicial to him, and injurious to his character as a trader. Now, the real facts were, that in the course of the trial before me of the former action, the statement of the then Defendant, that he had never endeavoured to represent himself or pass himself off on the trade or the public as being the original firm of *Hayward*, was completely proved to my satisfaction, and the action, so far as it sought relief on that head, as well as on the other heads, was dismissed. But, in the course of the hearing the then Defendant expressed his willingness to give an undertaking that he would not make any such representation. He said that he had not done so, and that he was not doing so, but still he would undertake that he would not do so in future; and it seemed to me desirable that his undertaking to that effect, which he voluntarily offered to give, should appear on the face of the judgment, so as to prevent there being any question in the future as to the posi-

(1) 1 H. & N. 251. (2) 1 Ex. D. 91.

tion which he took up, and he assented to that being done. I have said that the case against him on that point failed altogether, but it did appear that, without his knowledge or concurrence, a person who acted as his agent had on two or three occasions represented that the firm of his principal (the then Defendant), was the original firm of *Hayward*, and so far, of course, as that was a representation made by the Defendant in the course of his business by his authorized agent, he was responsible for it. But, on the other hand, it was not a matter in respect of which I should have granted any injunction against him, inasmuch as it had not been done with his knowledge, or privity, or concurrence in any way, and he repudiated it from the first. The circular complained of, means, in my opinion, and would have been understood by an ordinary reader as meaning, that, in that action, which was brought by *Hayward & Sons* on the ground of there having been serious misrepresentations in circulation to their prejudice, the Court had come to the conclusion that the Defendant was in the wrong, and had ordered him to do something, whereas in fact, instead of making any order upon him, it dismissed the action against him. I may test whether the circular fairly represented what had passed at the trial in this way. The fact was that the then Defendant never had represented that his firm was the original firm; that he disclaimed any intention of doing so, but that, unknown to him, his agent had on two or three occasions done so. Suppose a statement to that effect, which would have been true, had been made in the circular, would it have done any good to the present Defendants? Clearly, the present Defendants would not have put such a statement in their circular at all, because it could not possibly have done them any good, or have done the present Plaintiff any harm. But the present Defendants represented that an order had been made against the then Defendant, when in fact no such order had been made, and, if that order had been made, it would, in my opinion, certainly have prejudiced the present Plaintiff in his trade. The statement, therefore, in the circular, as it would be understood by ordinary readers, was, in my opinion, totally incorrect; it misrepresented the judgment of the Court, and it was therefore a libel.

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But it is said that it was a privileged communication, and, if so, though the statement may be one, which, if it could not be excused, would be a libel for which the present Defendants would be responsible, yet, if it was made under circumstances which rendered it privileged, they would be within their right in making it. Now, in considering whether the statement is privileged, it is important to consider whether it is true. That circumstance would not be conclusive, because a statement, although untrue, might be privileged, and even though true it might not be privileged. The question of truth, therefore, though important, is not conclusive, but, as I have already pointed out, the statement was not true. If that is so, where is the privilege in making an untrue statement of this kind? It is said that it was done for the purpose of protecting the present Defendants in their business. but, in my opinion, any such statement was wholly unnecessary for the purpose, and, moreover, this must be borne in mind, that even if it was privileged, it would not be the less a libel for which the Defendants would be responsible if it was put forward by them maliciously. The effect of proving that a statement is privileged is to get rid of the malice which the law presumes in a libellous statement, and to throw upon the other party the *onus* of shewing that there was malice in fact, or, as it is often called, "express malice." In the present case it appears to me that express malice is shewn. In the first place, the statement is incorrect. That, as I have said, is by no means conclusive, because a privileged communication may be an untrue one; and, therefore, if you want to shew that a statement was malicious, it is not sufficient to shew that it was not true, but it is necessary to shew that it was untrue to the knowledge of the person who made it. In the present case it seems to me, for the reasons which I have mentioned, that the statement was not only untrue, but was untrue to the knowledge of the present Defendants, who were parties to the former action. Therefore, an untrue statement was deliberately put forward by them.

Then it appears from the affidavit of Mr. *Philp*, one of the members of the Defendants' firm, that he knew what the effect of the circular would be, because in his affidavit he says, "I submit that the said circular is not libellous, and that it is not

calculated unfairly to injure the Plaintiff in his business. Certainly it was not issued by us with any such intention, and I believe that the Plaintiff's business has not, in fact, been injured by it." He does not suggest that the tendency of it would not be to injure the Plaintiff, but he suggests that the injury which the Plaintiff would sustain is one which might be fairly cast upon him under the circumstances. In my opinion it could not. And this also should be borne in mind, that Mr. *Philp* attempted to justify the circular upon a different ground, viz., that a statement with respect to the former action had appeared in a newspaper, and, though it is not said that the present Plaintiff was the author of that statement, or that he was in any way responsible for its publication, it is suggested that he distributed some copies of the newspaper which contained it. Of course, the sending out of copies of the newspaper might be a publication of a libel by him, and it is said that the statement which was made in the newspaper so sent out justified the present Defendants in issuing their circular by way of correcting that statement. I have read that statement in the newspaper, and, in my opinion, there was nothing in it which could justify the present Defendants in doing what they have done. Even assuming that something wrong had been done by the Plaintiff, it does not appear to me that it would justify the Defendants. But, in my opinion, the newspaper statement is a correct statement of the effect of the judgment actually given at the former trial, and it cannot, therefore, afford any justification for the Defendants' circular, even if under any circumstances it could have done so, which I do not think it could. The result, therefore, is that there is a publication by the Defendants of a libel upon the Plaintiff, which he is entitled to have restrained by injunction.

Then the Plaintiff also asks for damages. No special damage is alleged, nor is the case one in which it is necessary to allege special damage. The libel upon the Plaintiff in the carrying on of his trade was quite sufficient to justify the proceedings, without its being necessary to prove special damage. The Plaintiff asks, therefore, for general damages, and the evidence upon that point is very vague. I do not say that it could have been much more precise, but, as a matter of fact, it is left as vague as possible.

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[His Lordship referred to the evidence on this point, and continued:—] It comes merely to this, that since the issue of the circular the Plaintiff's business has fallen off; he does not say in terms (he may say so inferentially in his later affidavit), that the falling off was on account of the publication of the circular. And there is also this very significant matter with regard to the question whether the Plaintiff has sustained any damage by the publication. The circular was first published on the 1st of June in the *Liverpool Exhibition*, and it appears that on or about the 20th of June the present Plaintiff became aware that the circular was being issued. During the month of July no proceeding was taken by the Plaintiff, no writ was issued, and no complaint was addressed to the Defendants. It is said that the Plaintiff's solicitor made a complaint of the circular; but that complaint was merely this. The solicitor says: "I told him" (that is one of the members of the Defendants' firm) "that the circular referred to contained an unfair report of the judgment in *Hayward & Sons* v. *Hayward & Co.*, and that, if persevered in, it would lead to further litigation and expense, which I thought was greatly to be regretted." So we have got this fact, that, by the middle of July the matter had been laid by the Plaintiff before his solicitors, but, although they were then consulted about it, no complaint whatever was made. Then it appears by the Plaintiff's affidavit that it was on the 20th or 25th of August he discovered that the circular was being distributed at the Exhibition. It has been put to me that great harm has been done to the Plaintiff by the publication there, but there is no evidence whatever (I do not think it is suggested) that this circular had been published in any way except at or in connection with the Exhibition. But even then, when the Plaintiff discovered on the 20th or 25th of August that the circular was being distributed in the Exhibition, he did not take any steps to prevent its circulation, and it was not until the Exhibition was on the point of closing that, on the 25th of October, 1886, the writ in this action was issued, and, with the exception of that casual remark made by the Plaintiff's solicitor to one of the Defendants in the middle of July, to which I have already referred, the circular was never made the subject of any complaint to the Defendants till the

writ was actually served upon them. I do not forget that I have been told that the issue of the writ was postponed partly for this reason, that, inasmuch as I had tried the former action, it was considered desirable that this matter also should be brought before me. The convenience of that I quite appreciate, but that explanation does not seem to me sufficient. In the first place, the application might have been made in June or July when the Court was sitting, and, even if there had been a fresh occasion for proceedings being taken on the 20th of August, the vacation Judge was then sitting, and he could have dealt with the matter at once. It seems to me, therefore, that the Plaintiff's delay in taking steps with respect to the circular is enough to shew that the damage sustained by him by reason of its issue must have been of a very trifling character, and I think that I cannot fairly give more than nominal damages. I think that £5 is sufficient. The Plaintiff is entitled to the injunction which he asks, and to the costs of the action.

Solicitors: *Thomson, Son, & Brooks; Bompas, Bischoff & Co.*

W. L. C.

In re GREGSON'S TRUSTS.

Appointment of New Trustees—Appointment of Additional Trustee when no Vacancy—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *s.* 32 [*Revised Ed. Statutes, vol. x., p.* 990]—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 31, *sub-s.* 2.

Held, that under sect. 32 of the *Trustee Act*, 1850, the Court has jurisdiction to appoint an additional trustee, even though there is no vacancy in the trusteeship.

In re Brackenbury's Trusts (1) followed.

Semble, that the power conferred by sub-sect. 2 of sect. 31 of the *Conveyancing Act*, 1881, to increase the number of trustees, "on an appointment of a new trustee," only arises when an appointment is being made to supply a vacancy in the trusteeship.

PETITION for the appointment of a new trustee of a will and codicils.

The testator by his will appointed his wife and his son and

(1) Law Rep. 10 Eq. 45.

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another person trustee thereof. He afterwards revoked the appointment of his wife and his son, and appointed his daughter to be trustee jointly with the third person originally appointed. He gave beneficial interests to his wife, his son, and his daughter, but he afterwards revoked the gifts to his wife. He originally gave a power of appointing new trustees to his wife, and there was some doubt on the construction of the codicils whether he had revoked this power.

The petition was presented by the widow, the daughter, and the other trustee, and it asked for the appointment of another trustee of the will and codicils, in addition to the existing two trustees.

The petition was not served on the son, he being out of the jurisdiction.

Farwell, for the Petitioners :—

It is doubtful whether an additional trustee could be appointed under sub-sect. 2 of sect. 31 of the *Conveyancing Act*, 1881, which gives power to increase the number of trustees "on an appointment of a new trustee." That appears to mean that the number can be increased, only when an appointment of a trustee is being made to fill up a vacancy.

[NORTH, J. :—I think that is the meaning.]

But the Court has power under sect. 32 of the *Trustee Act* to increase the number of trustees, though there is no vacancy. The words of that section are perfectly general, and this was the view taken by *James*, V.-C., in *In re Brackenbury's Trusts* (1). Though he said he could not precisely see where the right was to have a second trustee appointed, he must have held that he had jurisdiction under sect. 32, or he would not have made the appointment.

NORTH, J. :—

I can make the appointment under sect. 32. I will follow the decision in *In re Brackenbury's Trusts.*

Solicitors : *Pritchard, Englefield & Co.*

W. L. C.

(1) Law Rep. 10 Eq. 45.

In re HETHERINGTON'S TRUSTS.

NORTH, J.

1886

Nov. 27, 29.

Appointment of New Trustees—Separate Sets of Trustees for distinct Trusts—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), [*Revised Ed. Statutes, vol. x., p.* 981]—*Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 5.

Under the trusts of a will different parts of the testator's property were subject to distinct trusts, but in a certain event the trusts would coalesce:—

Held, that there was power to appoint separate sets of trustees for the different parts of the property.

PETITION for the appointment of new trustees of the will of *Charles Hetherington*, who died on the 9th of June, 1872.

Of the property subject to the trusts of the will, part was held in trust for *Julia Wilby*, the wife of *W. H. Wilby*, for her life, for her separate use, without power of anticipation, and after her death in trust for her child, or all and every her children, who should attain twenty-one, in equal shares, if more than one, as tenants in common, and if only one, the whole to such one child, and, in default of any such child, in trust as *Julia Wilby* should appoint among persons of her own blood, with remainder, in default of appointment, to *William* and *Mary Tildesley*.

Another part of the property was held in trust for *Julia Wilby* for her life, for her separate use, without power of anticipation, and after her death in trust for her children, *Julia Maria Wilby* and *Constance Amelia Wilby*, in equal shares, and, if either of them should die under twenty-one and unmarried, then the whole was to be in trust for the survivor, her heirs, executors, and administrators, and, in case both of them should die under twenty-one and without having been married, the whole was to be in trust for *Edith Hetherington* and *Mary Hetherington*, with benefit of survivorship, and, in case they should both die under twenty-one and unmarried, in trust as to part for *Isabella Ashworth* absolutely, and as to the remainder in trust for *William Tildesley* absolutely.

Another part of the property was held in trust for *Edith*

NORTH, J. 1886 ~~ *In re* HETHERINGTON'S TRUSTS.

Hetherington and *Mary Hetherington*, in equal shares as tenants in common, but, in case either of them should die in the lifetime of the testator or under the age of twenty-one, then the share of her so dying was to be in trust for the survivor, her heirs and assigns, and, if both of them should so die, then in trust for *W. H. Tildesley*, his heirs and assigns.

The remainder of the property was held in trust for *Mary Hetherington*, to be paid and transferred to her on her attaining twenty-one or being married with consent, but, if she should die in the testator's lifetime, or under twenty-one and unmarried with such consent as aforesaid, then in trust for *Edith Hetherington*, to be paid and transferred to her on her attaining twenty-one or being married with such consent as aforesaid, but, if she should die in the testator's lifetime, or under twenty-one and unmarried with such consent as aforesaid, then the fund was to be held on the same trusts for *Julia Wilby* and her children and appointees as were by the will declared of that part of the property first above mentioned, with the ultimate remainder to *W. H. Tildesley* absolutely.

Julia Wilby had had only two children, viz., *Julia Maria Wilby*, who was born in December, 1867, and *Constance Amelia Wilby*, who was born in August, 1871, and died in September, 1875. *Edith Hetherington* and *Mary Hetherington* were both living; the former having attained twenty-one and being unmarried; the latter being under twenty-one and unmarried. *W. H. Tildesley* was the surviving trustee of the will and he desired to retire.

The petition was presented by *Julia Wilby* and *Julia Maria Wilby* (by her mother as her next friend) and it asked for the appointment of *E. H. Armitage* and *C. E. Wilding* as trustees of the will, so far as related to those parts of the property in which the Petitioners were primarily interested, and for the appointment of *J. T. Lumley* and *E. H. Armitage* as trustees, so far as related to those parts in which the Misses *Hetherington* were primarily interested.

The petition was entitled in the matter of the *Trustee Acts*, and of the *Conveyancing Act*, 1882, and was served on *W. H. Tildesley*, and on *Edith* and *Mary Hetherington*.

Waggett, for the Petitioners :—

By virtue of the *Trustee Act*, 1850, and sect. 5 (1) of the *Conveyancing Act*, 1882, the Court has power to appoint separate sets of trustees for distinct trusts.

F. G. Bagshawe, for the Misses *Hetherington*.

G. Miller, for the retiring trustee.

NORTH, J. :—

I am not satisfied that there are distinct trusts within the meaning of sect. 5 of the *Conveyancing Act*, 1882, because in one event the trusts may coalesce. I will consider the point.

Nov. 29. NORTH, J. :—

I think I have power to make the appointment of separate sets of trustees as asked by the petition, and that the case is one in which it is desirable to do so.

Solicitors : *Van Sandau & Co.; Mason & Son.*

(1) Sect. 5, sub-sect. 1 : "On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first mentioned part."

W. L. C.

NORTH, J.
1886
Dec. 9.

In re HARRISON.
PARRY *v.* SPENCER.

[1881 H. 3888.]

Parol Contract—Conversion.

A testator agreed verbally to sell land, and received a deposit. The residuary devisee contracted in writing to sell the land to the same purchaser at the same price, to be paid partly by the deposit:—

Held, that the devisee had not adopted his testator's parol contract so as to effect a conversion relating back to the testator's lifetime.

THIS was an action for the administration of the estate of *George Harrison*. The Plaintiff was residuary devisee, residuary legatee, and administrator with the will annexed of the testator. The personal estate of the testator was insufficient to pay the debts of the testator in full.

The testator was possessed of certain building land at *Leicester*. In April, 1880, he agreed verbally to sell a piece of the land to *Daniel Pick* at the price of 10*s*. a square yard. On the 5th of August, 1880, *Daniel Pick* paid a deposit of £50 to *T. C. Harris*, a clerk of the testator, and took a receipt in the following terms: "Received of Mr. *Pick* the sum of £50 on account of Mr. *Harrison* (*Brandon Street*) *Mann's* meadow about 75 feet frontage."

It was subsequently agreed verbally between *Daniel Pick* and the testator's architect that *Daniel Pick* should have an additional two feet of frontage. The price of the land with the additional frontage at 10*s*. a square yard would be £516 10*s*. 3*d*.

An agreement in writing, dated the 10th of March, 1882, was made between the Plaintiff as vendor, and *Daniel Pick* as purchaser, for the sale of the land that the testator had agreed to sell to *Daniel Pick* "at the price of £516 10*s*. 3*d*., the purchase-money to be paid as follows, namely, the sum of £50 having been paid to the vendor's devisor by way of deposit on the 5th day of August, 1880, and the residue on the 12th day of April now next." The agreement contained conditions as to title, as to completion and as to the repair of roads, and it was provided that

the agreement was conditional on the same being approved by the Judge to whom the action was attached. An order was obtained approving of the agreement with the variation that the purchase-money should be paid into Court.

The Chief Clerk had found that the land sold to *Daniel Pick* was converted in the testator's lifetime and the purchase-money ought to devolve as personal estate of the testator. This was a summons on the part of the Plaintiff to vary the certificate of the Chief Clerk as to that and another finding.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the Plaintiff:—

The contract made by the Plaintiff with Mr. *Pick* clearly was intended to be and was a new contract and not an adoption of the testator's contract. The case was therefore outside the decision of *Kindersley*, V.C., in *Frayne* v. *Taylor* (1), where an heir had expressly in his conveyance adopted his testator's parol contract and otherwise shewn that he adopted the contract. There the conversion related back to the date of the contract under which the conveyance was made. Here there could be no conversion till the Plaintiff's own contract was made.

Cookson, Q.C., and *Dauney*, for specific devisees:—

The purchaser and the amount of purchase-money are the same as in the testator's contract and part of the purchase-money was actually paid to the testator, these circumstances shew that there has been an adoption of the parol contract and the case comes within the decision of *Frayne* v. *Taylor*.

Eve, for other specific devisees.

Osler, for trustees of the will, newly appointed.

NORTH, J.:—

I think the case is a clear one. I see no evidence in the contract that there has been an adoption of a previous contract. It seems to me expressed exactly in the way in which it would have been, if it was intended to be a new contract, when no

(1) 33 L. J. (Ch.) 228.

NORTH, J.
1886
In re HARRISON. PARRY *v.* SPENCER.

contract had been entered into before. It is quite true there is a reference to £50 which had been paid to the devisor by way of deposit, but there is nothing to shew on the face of it for what the deposit was made or what the purchase-money was, or who the parties were. I think if it had been intended to carry out the old contract it would have been referred to in different terms. I think it was clearly a new contract, and there was a conversion only after the death of the testator. It was not contended that there was any binding contract which could have been specifically enforced against the testator in his lifetime.

Solicitors: *Field, Roscoe, & Co.; Kingsford, Dorman, & Co.*

D. P.

In re NAYLOR AND SPENDLA'S CONTRACT.

C. A. 1886 Dec. 13, 17.

[1886 N. 425.]

Copyhold—Vendor and Purchaser—Double Fine—Settled Land Act, 1882, *s.* 20.

A copyholder who had been admitted to the copyhold to him and his heirs died, leaving a will by which he devised it to trustees upon trust to pay the rents to his widow for life. Shortly after his death the widow sold the property under the powers of the *Settled Land Act*, 1882. The trustees had not been admitted. The lord of the manor claimed to be paid, in addition to the fine payable by a purchaser on admittance, the fine which would have been payable if the trustees had been admitted:—

Held by *Cotton* and *Bowen*, L.JJ. (affirming the decision of *Chitty*, J.), *dissentiente Fry*, L.J., that the lord could only claim one fine.

JOHN NAYLOR by will, dated the 30th of September, 1869, devised all his real estate to *Thomas Naylor* and *J. N. Sutterby* upon trust to occupy or let it at their discretion, and to pay the net profits or rents thereof to his wife for life for the maintenance of herself and the education and bringing up of his family, the same to be for her exclusive use and free from the debts and control of any future husband.

The testator died on the 7th of April, 1885. He was at his death tenant on the Court rolls of a copyhold held of the manor of *Sutton Guanock*, in *Lincolnshire*, to which he had in 1869 been admitted to hold to him and his heirs. On the 12th of February, 1886, *Eliza Naylor*, the widow, sold the property to *Richard Spendla* under the powers of the *Settled Land Act*, 1882. The trustees had not been admitted, but the lord was not yet entitled to seize for want of a tenant.

The lord and steward of the manor, who were the purchaser's solicitors, insisted that besides the fee payable on admission they were entitled to the same fine and fees as would have been payable if the trustees or the heir-at-law had been admitted. The arrangement between the vendor and purchaser was that if the extra fine and fees were payable, the vendor should pay them. The purchaser took out a summons under the *Vendor and Purchaser Act*, 1874, in which the lord and steward concurred, asking for an order declaring that the vendor conveying to the purchaser

C. A. 1886 — *In re* NAYLOR AND SPENDLA'S CONTRACT.

under sect. 20 of the *Settled Land Act*, 1882, was liable, or that the estate of the testator was liable, to pay to the lord the fine and to the steward the fees which would respectively have become due and demandable in case the customary heir or the devisee in trust of the testator had required to be, and had been, admitted tenant, and as on the admittance of such customary heir or devisee. The lord and steward appeared and agreed to be bound by the decision on the summons.

The summons was heard by Mr. Justice *Chitty* in Chambers on the 24th of June, 1886, and his Lordship made the following order: "The Judge is of opinion that neither *Eliza Naylor*, the vendor, nor *R. Spendla*, the purchaser, is liable to pay to the said lord the fine and to the said steward the fees which would have become due and payable if the customary heir or devisee in trust of the testator *John Naylor* had applied to be admitted, and had been admitted, tenant of the said copyhold hereditaments, but that the lord is bound to admit the said purchaser *R. Spendla* on payment by him of a single fine and set of fees in respect of his own admittance."

The purchaser, the lord, and the steward appealed against this order, and the appeal was argued on the 13th of December, 1886.

Archibald Brown, for the appeal:—

I rely on sect. 20, sub-sect. 3, of the Act, which says that the purchaser is to be admitted "on payment of customary fines, fees, and other dues or payments." The expression "on payment" shews the words to refer to fines payable prior to the admittance of the purchaser, for his own admittance fine is not payable till he has been admitted. The argument on the other side comes to this, that there may be a surrender without the surrenderor having been admitted. Mr. Justice *Chitty* treated the authority given by the Act to the tenant for life to sell as putting the case on the same footing as if the testator had given the tenant for life a power of appointment. But the statute does not use the word "power." The *Settled Estates Act*, 1877, sect. 22, provides that a conveyance under that Act shall operate as if the settlement contained a power of revocation and appointment, but there is nothing analogous in this Act. I contend that what is given is

an authority to convey the interests of the persons claiming under the settlement, not the estate of the settlor. Sect. 20, sub-sect. 1, provides that the tenant for life may convey "for the estate or interest the subject of the settlement," *i.e.*, for the aggregate of the interests which the claimants under the settlement take. Sect. 5 seems to assume that the term of years there mentioned is to be created out of the estate of the tenant for life, and so in sect. 18. The settled estate is not the same thing as the estate of the settlor. *Sheppard* v. *Woodford* (1) supports my contention. Suppose a devise to trustees in trust for *Eliza Naylor* absolutely, it is clear that a fine as on the admittance of the trustee must be paid. Surely the same must be the case if the devise were to a trustee in trust for an infant: sect. 59. Sect. 61, as to married women, is strong to shew that dispositions under the Act are to take effect out of the interests of the beneficiaries. Effect may be given to sect. 20, sub-sect. 2, by means of a power, but it is a more natural interpretation to construe it as taking effect by a conveyance of the interests of the beneficiaries. The Act in fact authorizes the tenant for life to convey the estates in remainder. The *Wills Act*, 1 Vict. c. 26, s. 4, provides for the payment of all such fines, fees, &c., as would have been payable if the person coming to be admitted had acquired his title under the old law.

[COTTON, L.J.:—It is rather against you that you have no reference in the *Settled Land Act* to fines and fees which would have been payable.]

I contend that sect. 20, sub-sect. 3, expresses in substance the same thing. I contend therefore that in addition to the fine on admission the same fine must be paid as if the trustee or the heir had been admitted.

H. Cadman Jones, for the vendor:—

I submit that Mr. Justice *Chitty* was right in holding that the statute imported into the will a power of appointment in the tenant for life, under which she could dispose of the property for "the estate or interest the subject of the settlement," and that

(1) 5 M. & W. 608.

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this must mean the whole estate or interest devised. The purchaser under such a conveyance must take the whole of the estate as if it had been devised to him, and is only liable to one fine. This cannot be considered an unjust interference with the rights of the lord, it is only making the statute import into the will a power which the testator himself might have inserted. It is an unnatural construction of sect. 20, sub-sect. 3, to make it refer to fines payable by some one else before the purchaser's admission, for in the vast majority of cases there would be no pretence for claiming any such fines. The statute, then, cannot reasonably be supposed to have referred to them. The words "on payment of customary fines, &c.," were no doubt intended to prevent an argument that the statute in enacting that the purchaser should be admitted on the strength of this new mode of alienation, not known to the customary law, meant him to be admitted without a fine. The view that the statute gives an authority to convey the interests of the persons claiming under the will is not a natural construction of an authority "to convey by deed for the estate or interest the subject of the settlement," but if that view were adopted, it would not practically alter the result, for the right of the trustee to admission would pass by the deed, as an interest under the settlement.

A. Brown, in reply.

1886. Dec. 17. COTTON, L.J.:—

This is a summons under the *Vendor and Purchaser Act*, 1874, taken out for the purpose of determining whether any fine other than the usual fine on admittance is, under the circumstances, payable to the lord of the manor in respect of a copyhold sold under the *Settled Land Act*, 1882. On a summons under the *Vendor and Purchaser Act*, the only persons between whom the Court can decide anything are the vendor and the purchaser. But in the present case the lord and the steward of the manor came in and agreed to be bound. The vendor is equitable tenant for life of a copyhold devised to trustees who have not been admitted. She sold under the powers of the *Settled Land Act*. A requisition was made that the trustee must be admitted,

but that was abandoned, and a requisition substituted that the vendor must pay the fine which would have been payable if the trustee had been admitted. Sect. 20 of the *Settled Land Act* enacts that on a sale the tenant for life may as regards land sold, including copyhold land vested in trustees, convey the same by deed for the estate or interest the subject of the settlement to the uses and in the manner requisite for giving effect to the sale, and that such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under the Act, shall be effectual to pass the land conveyed discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, with some exceptions which need not be noticed. It is then enacted by sub-sect. 3, that "In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the Court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly." The question is whether those words "on payment of customary fines, &c." give the lord a right to demand in addition to the fine payable by the purchaser on admittance a fine as on the admittance of the trustees. In my opinion the Act was not intended to take away any of the rights of the lord, but was not intended to give him any. The lord would have no right to a fine for the admittance of trustees who never were admitted, and from whom the purchaser's right to be admitted is not derived. If the words "on payment of customary fines, &c." had not been inserted it might have been contended that as the statute created a new kind of title to admittance the lord could not demand a fine on the admittance of the purchaser. The words, therefore, have a reasonable meaning without construing them to mean such fines as would have been payable if the purchaser had obtained a title to admittance in the way in which he must have obtained it if the *Settled Land Act* had not passed. That seems to me a forced construction, and if the Legislature had intended it I think that language like that in sect. 4 of the

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Wills Act would have been used. The appeal in my judgment fails.

BOWEN, L.J.:—

I am of the same opinion and for the same reasons.

FRY, L.J.:—

I have the misfortune to differ from the rest of the Court. The statute provides that the purchaser shall be admitted "on payment of customary fines, fees, and other dues or payments." The words are very general: the statute does not speak of "*the* customary fines, fees, and other dues and payments payable on admittance," but of customary fees, &c. It is obvious that there are no customary fees payable on the new form of deed given by the statute. What, then, are the customary fees and payments referred to? There are two possible answers: either those which would have been payable on or before admittance if the Act had not passed: or those which would have been payable on admittance if the Act had not passed. The former construction leaves the rights of the lord untouched, the latter deprives him of his rights. In my opinion the Act had quite a different object, and was not intended to interfere with the rights of the lord, and I think that the construction which leaves them untouched is to be preferred. As, however, my learned Brothers are of a contrary opinion the appeal will be dismissed with costs.

Solicitors for Appellants: *Mossop & Rolfe*, agents for *Mossop & Mossop, Long Sutton, Lincolnshire.*

Solicitors for Vendor: *Robinson, Preston, & Stow*, agents for *Sturton, Holbeach, Lincolnshire.*

H. C. J.

EDEN *v.* WEARDALE IRON AND COAL COMPANY.

C. A. 1887 Jan. 11.

[1884 E. 321.]

Practice—Third Party Procedure—Leave to defend Action—Interrogatories to Third Party—Rules of Supreme Court, 1883, *Orders* XVI., *r.* 53; XXXI., *r.* 1.

Persons who had been served by a Defendant with a third party notice for the purpose of claiming indemnity, obtained an order (1) that the question of indemnity should be tried after the trial of the action; and (2), that they should be at liberty to appear at the trial of the action, and oppose the Plaintiff's claim so far as they were affected thereby, and for that purpose to put in evidence and cross-examine witnesses:—

Held (affirming the decision of *Kay*, J.) that the third parties had put themselves in the position of "opposite parties" to the Plaintiff; and the Plaintiff had a right to examine them by interrogatories.

MacAllister v. *Bishop of Rochester* (1) followed.

THE action in this case was brought by the owner of a piece of freehold land at *Middridge*, in the county of *Durham*, for specific performance of an agreement with the Defendants, the *Weardale Iron and Coal Company, Limited*, for a lease to them of the coal and fire-clay under the Plaintiff's land for twenty-one years, or for damages.

Before the agreement was completed the Ecclesiastical Commissioners gave notice to the Defendants that the coal and fire-clay belonged to them as lords of the manor; the Defendants thereupon refused to accept the lease from the Plaintiff, who accordingly brought the present action.

The Defendants put in a defence stating the circumstances under which the agreement was made, and on the 12th of June, 1884, served notice on the Ecclesiastical Commissioners under Order XVI., rule 48, claiming indemnity from them in case the Plaintiff should establish his claim.

The Ecclesiastical Commissioners having entered an appearance, the Defendants took out a summons for directions for the trial of the action between themselves and the Commissioners, and on the 30th of June, 1884, an order was made on the summons giving the Commissioners leave to deliver a counter-claim in

(1) 5 C. P. D. 194.

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the action; and the Commissioners afterwards obtained an order giving them leave to deliver a statement of defence with their counter-claim. The Commissioners then put in a statement of defence and counter-claim, but it was held by the Court of Appeal that the Court had no power to give a third party leave to file a counter-claim, and the counter-claim was accordingly struck out (1). The Commissioners then, on the 20th of December, 1884, obtained an order to strike out their defence: but on the 17th of March, 1885, they obtained another order that, notwithstanding the order of the 30th of June, 1884, the question of indemnity as between the Ecclesiastical Commissioners as third parties and the Defendants, should be tried after the trial of the action, and that, pursuant to Order XVI., rule 53, the Ecclesiastical Commissioners as such third parties should be at liberty to appear at the trial and oppose the Plaintiff's claim so far as they might be affected thereby, and for that purpose to put in oral and documentary evidence, and to cross-examine the Plaintiff's witnesses. The Plaintiff then applied for leave to deliver interrogatories to the Commissioners, and Mr. Justice *Kay* made an order on the 26th of November, 1886, granting the application. From this order the Commissioners appealed.

Elton, Q.C., and *Blakesley*, for the Appellants:—

The order was made under Order XXXI., rule 1. But that rule only empowers the Court to grant leave to the plaintiff or defendant to file interrogatories in writing "for the examination of the opposite parties." Here the Commissioners are not "opposite parties" to the Plaintiff. There is no issue joined between them. The order for directions gave us leave to make a defence: but we have put in no defence. The Plaintiff has no cause of action against us, and the object of our having leave to appear at the trial and to examine witnesses is to assist us in trying the question of indemnity between ourselves and the Defendants: *Coles* v. *Civil Service Supply Association* (2). In *MacAllister* v. *Bishop of Rochester* (3), which Mr. Justice *Kay* followed in making this order, there was a distinct issue between the plaintiff and the third

(1) 28 Ch. D. 333.
(2) 26 Ch. D. 529.
(3) 5 C. P. D. 194.

parties. The case is commented on in *Molloy* v. *Kilby* (1). Moreover, that was an action for production of documents under Order XXI., rule 12 (1875), which did not contain the words "opposite party."

[LOPES, L.J., referred to *Shaw* v. *Smith & Pease, Partners, Limited* (2) and *Brown* v. *Watkins* (3).]

The Defendants are prejudiced as well as the Commissioners by their having to answer interrogatories.

Sir *A. Watson*, Q.C., and *Dunham*, for the Plaintiff, were not called on.

COTTON, L.J. :—

This is an appeal from a decision of Mr. Justice *Kay*, who gave the Plaintiff leave to administer interrogatories to the Ecclesiastical Commissioners, who were not original parties to the action, but were added as third parties by the Defendants. The action was brought by the Plaintiff for specific performance of an agreement to take a lease of some mines, and, in the alternative, for damages. The Defendants claimed an indemnity, in case the Plaintiff should succeed in his claim, from the Ecclesiastical Commissioners, and brought them in as third parties. If the matter had stopped there, there would have been no issue between the Plaintiff and the Commissioners, and they would not be contending with the Plaintiff as "opposite parties." But in March, 1885, the Commissioners, not being willing to admit the claim of the Plaintiff in the action, or the claim of the Defendants against them for indemnity, entered an appearance, and obtained an order, by which it was ordered that the question of indemnity as between the Commissioners as third parties and the Defendants should be tried after the trial of the action; with which the Plaintiff had nothing to do. But the order did not stop there, for it went on to state that, pursuant to Order XVI., rule 53, the Ecclesiastical Commissioners, as third parties, should be at liberty to appear at the trial, and to oppose the Plaintiff's claim,

(1) 15 Ch. D. 162. (2) W. N. 1886, p. 207.
(3) 16 Q. B. D. 125.

C. A. 1887 EDEN v. WEARDALE IRON AND COAL COMPANY. Cotton, L.J.

for they might be affected thereby, and for that purpose to put in oral and documentary evidence, and to cross-examine the Plaintiff's witnesses. It was contended that this was only to enable them to try the question of indemnity between themselves and the Defendants. But that is not the intention of the order: it is intended to enable the Commissioners, at the trial, not as between themselves and the Defendants, but as between themselves and the Plaintiff, to oppose the Plaintiff's claim in the action, so far as it affected them—that is, the Plaintiff's claim to the ownership of the minerals. Whatever the position of the parties would have been if no order had been obtained, it seems clear to me that the Commissioners, having obtained this order, have put themselves in the same position as if they had been originally defendants in the action, and have raised issues which were raised by the Defendants. Order XXXI., rule 1, gives power to administer interrogatories to "opposite parties": and it appears to me that the Commissioners, although originally not parties, have put themselves in the position of parties, and parties who are opposing the Plaintiff. I think, therefore, that this appeal fails. I will add that the case of *MacAllister* v. *Bishop of Rochester* (1) appears to me to be in point, and that *Molloy* v. *Kilby* (2) is not in point, for in the latter case there was no issue between the plaintiff and the third party in the original action. It was a case of counter-claim, to which the plaintiff and the third party were co-defendants.

LINDLEY, L.J.:—

The question in this appeal turns on the construction of the order of the 17th of March, 1885. There are two things done by that order. It says, first, that the question of indemnity is to be tried after the trial of the action; and secondly, it puts the Ecclesiastical Commissioners in the same position as the Defendants at the trial of the action. For what could they do, if they were Defendants, more than they have leave to do under this order? The issue on which they have liberty to appear and examine witnesses is the Plaintiff's claim against the Defendants so far as it affects the Commissioners, not any issue between the

(1) 5 C. P. D. 194. (2) 15 Ch. D. 162.

Commissioners and the Defendants. I therefore agree that the appeal fails.

LOPES, L.J.:—

I also think that the order appealed from is right. If the Ecclesiastical Commissioners had been brought in as third parties, and no further order had been made, I think the order appealed from would have been wrong. But on the 17th of March, 1885, an order was made, which has not been appealed from, the effect of which was practically to place the Ecclesiastical Commissioners in the same position as if they were Defendants. I am, therefore, of opinion that the order was right, and that the appeal must be dismissed.

Solicitors for the Appellants: *White, Borrett, & Co.*
Solicitors for the Respondent: *Crossman, Crossman, & Prichard.*

M. W.

In re WHITAKER. CHRISTIAN *v.* WHITAKER.

[1886 W. 1775.]

Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 5, 19—*After-acquired Property—Separate Use.*

By ante-nuptial settlement of 1873 the husband and wife covenanted to settle after-acquired property of the wife other than personal chattels, savings out of her separate income, or any moneys not exceeding in each case the value of £1000, "or any property belonging, or which may be given or bequeathed to or settled upon her for her separate use, all which excepted articles and property shall belong to the said (wife) and shall or may be used, enjoyed, and disposed of by her accordingly as if she were not under coverture."

Under the will, made in 1884, of her father, who died in the same year, the wife became entitled to a share of personalty exceeding £1000, and not limited to her separate use:—

Held, that having regard to sect. 19 of the *Married Women's Property Act*, 1882—the effect of which is to limit the operation of sect. 5 by preventing the provisions of marriage settlements from being interfered with or affected by withdrawing therefrom property, which independently of the Act must have been brought into settlement—the share of the wife under her father's will had not been made separate estate so as to fall within the

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exception, but was bound by the covenant to settle after-acquired, other than separate, property.

And, *semble*, per *Cotton*, L.J., that upon the construction of the covenant, independently of sect. 19, the property in question was not within the exception.

In re Stonor's Trusts (1) approved.

THE settlement, dated the 13th of January, 1873, and executed prior to the marriage of *Caroline Whitaker* and *J. H. Christian*, contained a covenant by them that they would convey or otherwise cause to be effectually vested in the trustees of the settlement all the real and personal estate whatsoever, if any, to which the said *Caroline* (the intended wife) or *J. H. Christian* in her right is or shall upon the solemnization of the marriage, or at any time or times afterwards during the intended coverture, be or become absolutely entitled for any estate or interest whatsoever in possession or reversion, or to which the said *J. H. Christian*, his executors or administrators, should or might become absolutely entitled in right of the said *Caroline*, for any estate or interest whatsoever, either in possession or reversion "other than any jewels, &c., or other chattels for personal use or enjoyment to which the said *Caroline*, or the said *J. H. Christian* in her right is or shall upon the solemnization of the said marriage, or at any time afterwards during the said intended coverture, be or become entitled, or any savings which the said *Caroline* may make out of her separate income, or any chattels, effects, or estate whatsoever which she may purchase with or out of her separate income, or any sum or sums of money, chattel or chattels, not exceeding in each case the amount or value of £1000, which from time to time may be given or bequeathed to the said *Caroline* by will or otherwise, or any property belonging or which may be given or bequeathed to or settled upon her for her separate use, all which excepted articles and property shall belong to the said *Caroline* as her separate estate, and shall or may be used, enjoyed, and disposed of by her accordingly as if she were not under coverture."

The property in settlement was limited in the usual way, life interests being given to the husband and wife with remainder to the children of the marriage.

(1) 24 Ch. D. 195.

By his will, dated the 4th of March, 1884, Mrs. *Christian's* father bequeathed the sum of £50,000 in trust for his wife for life, with remainder among his daughters equally, but the will did not contain any declaration that the shares of the daughters were given to their separate use.

The testator died on the 17th of October, 1884.

A summons was taken out for the purpose of obtaining the decision of the Court whether her share of the £50,000 (£10,000) under the will of her father, her title to which accrued upon the death of her father, and after the *Married Women's Property Act*, 1882, came into operation, came within the exception in the covenant to settle after-acquired property "other than property belonging or which may be given or bequeathed to or settled upon her for her separate use." Vice-Chancellor *Bacon* was of opinion that the case was governed by *In re Stonor's Trusts* (1), and that sect. 19 of the *Married Women's Property Act*, 1882, precluded the Act from operating so as to interfere with or affect settlements, and accordingly that the share must be brought into settlement. From this decision Mrs. *Christian* appealed.

Farwell, in support of the appeal :—

The effect of the *Married Women's Property Act*, 1882, s. 5, is to make the legacy, her title to which has accrued since the commencement of the Act (January, 1883) separate property of Mrs. *Christian*, and accordingly, being separate property, it falls within the exception, and is not bound by the covenant to settle future acquired property. The intention of the parties to that settlement was to exclude therefrom anything coming to her as separate property, and the omission by the testator of words limiting the shares of his daughters to their separate use is immaterial, as the Act has rendered such a limitation unnecessary; and for the purposes of the covenant it is quite immaterial whether the character of separate property has been created by will or settlement or by Act of Parliament. *In re Stonor's Trusts* is, I admit, an authority against me, but the effect of that decision is to write sect. 5 out of the Act, and to treat sect. 19 as repealing the previous provisions contained in sects. 5,

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6, and 7. That cannot have been the intention of the Legislature; and in *In re Queade's Trusts* (1) Mr. Justice *Chitty* stated that if it was intended by Mr. Justice *Pearson*, in *In re Stonor's Trusts* (2), to give the wide and extensive meaning to sect. 19—as comprising any settlement whatsoever and by whomsoever, which concerns or relates to a married woman's property—he should respectfully dissent from that judgment.

E. W. Byrne, for the trustees of the settlement:—

Sect. 19 has a double intention: first, existing settlements or contracts for a settlement are not to be disturbed by the Act; and secondly, as to future settlements, the Act is not to prevent any such settlements being made as could have been made before the passing of the Act; care being taken to use such language as would meet the altered circumstances of the law. The power given to married women by sect. 5 of disposing of property as their separate property was limited by sect. 19 so as not to interfere with vested rights or to withdraw from settlement, or interfere with the destination of, property under settlement. The case is concluded by *In re Stonor's Trusts*. *In re Queade's Trusts* is not in point, as there the settlement was post-nuptial and the married woman, though a party to it, was an infant.

Farwell, in reply.

COTTON, L.J.:—

The question we have to consider in this case is, whether the sum of £10,000, which comes to the lady under her father's will, is comprised in the covenant to settle after-acquired property.

At the time when the testator died the *Married Women's Property Act*, 1882, was in operation, which provides by sect. 5 that a married woman, though married before the Act, shall hold and deal with, as her separate property, all property which comes to her after the Act came into operation. Therefore, if there were nothing else, this property would, on the death of her father, be capable of being dealt with by the married lady as her

(1) 33 W. R. 816. (2) 24 Ch. D. 195.

separate property—as if she were a *feme sole*. Then we have to consider whether, having regard to sect. 19 of the Act and the terms of this covenant to settle, the property is withdrawn, by virtue of the Act, from what would otherwise have been the effect of the covenant in the settlement.

I certainly myself doubt whether, independently of sect. 19, the property would have come within the exception; because the exception is of "any property belonging, or which may be given or bequeathed to or settled upon her for her separate use—all which property shall belong to her as her separate estate, and shall or may be used, enjoyed, and disposed of by her accordingly as if she were not under coverture." The doubt in my mind is, whether "belonging" does not mean property "now belonging" to her, and whether "given to her or settled to her separate use" does not mean "given to her by the instrument to her separate use." However I will not decide it upon the mere construction of this covenant, because some of us entertain some doubt about it; but I will look to what is the real effect of sect. 19 of the Act.

In my opinion, whatever might otherwise have been the effect of this covenant, sect. 19 prevents sect. 5 of the Act from operating so as to add to the exception contained in the covenant to settle. Under the settlement the property would go to the husband for life, and to the children as in an ordinary settlement. If the contention of Mr. *Farwell* is to prevail, the effect of the provisions contained in sect. 5 would be to withdraw from the settlement this sum, and thereby affect the provisions in favour of the children of the marriage. Does sect. 19 allow that? It says: "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement, made or to be made, whether before or after marriage, respecting the property of any married woman." To my mind it is impossible to say that if sect. 5 brings this property within the exception in the covenant, the section will not affect or interfere with the provisions of the settlement. But for the Act of Parliament, it is perfectly clear that this property would not have come within the exception; it would not have been settled to her separate use, nor would it have belonged to the wife for her separate use.

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But it is said that sect. 5 gives power "to have and to hold, and to dispose of, as her separate property." Yes; but that must be read with the provision in sect. 19,—that that is not to be done so as to affect, or to interfere with, any provision in a marriage settlement. Mr. *Farwell's* argument was, that the effect of that was to prevent a married woman, when she got power to dispose of property under the Act, saying: "True I was bound by covenant to settle this property, but the Act of Parliament gives me statutory power to deal with it, which is independent of the covenant in my marriage settlement." That can hardly be so; because merely giving power to a woman to hold "as separate property" would not, fairly construed, give her a right, without regard to the covenant she entered into and which she could perform, to dispose of this as her separate property. I think it must mean that although this power is given to a married woman by sect. 5, yet it is not intended to interfere in any way with provisions made or to be made in a marriage settlement as to how the woman's property is to be dealt with, and that it prevents sect. 5 adding to the exceptions which are contained in the covenant.

In my opinion the decision appealed from is right, and the decision of Mr. Justice *Pearson* in *In re Stonor's Trusts* (1) was right also. It is unnecessary to consider *In re Queade's Trusts* (2) before Mr. Justice *Chitty*, because that particular question does not arise now, and any opinion one might give would be extra-judicial.

LINDLEY, L.J.:—

Many questions which arise under the *Married Women's Property Act*, 1882, are well-known to be extremely difficult, and I am not satisfied that I understand sect. 19 fully now; but it does not follow that I do not see my way to a short distance and very clearly. I think in this case the actual point we have to decide is clear, and, to my mind, clear to demonstration.

Just let us see what the rights of the parties would be but for this Act of Parliament,—not but for any particular section, but if the Act did not exist. There is no controversy at all that if we

(1) 24 Ch. D. 195. (2) 33 W. R. 816.

decide the question apart from this Act of Parliament of 1882, the property would be bound by the covenant to settle. That is unarguable; it is plain. Now what does the Act say? Sect. 19 says that nothing in this Act shall interfere with or affect any settlement made before marriage or to be made after marriage. What does that mean? It means that you cannot by this Act affect the rights of the parties under the settlement. That seems to me very clear; and although I do not say I cannot see difficulty in construing sect. 19 with sect. 5, still that does not affect this question. The property is bound by the covenant as if the Act had never passed. It appears to me that the decision appealed from is quite right.

LOPES, L.J.:—

These *Married Women's Property Acts* have raised very difficult questions; but I do not think there is any serious difficulty in deciding the point which is now before the Court.

The testator here did not leave the property in question to the Plaintiff for her separate use. Therefore the property in question is not within the exception in the marriage settlement, and was not subject to that settlement.

Now in 1882 this *Married Women's Property Act* was passed. [His Lordship read sect. 5.] The Act of Parliament therefore gives the property in question a character which brings it within the exception. In point of fact it withdraws it from the settlement and gives to it a different destination from that which it would otherwise have had. But then comes sect. 19. If, as I said, sect. 5 gives the property in question a different destination from that which it would have independent of the Act, it seems to me impossible to say that sect. 19 does not apply.

I think the decision of the Court below was right.

Solicitors: *Paterson, Snow, Bloxam, & Kinder.*

F. G. A. W.

C. A.
1886
Nov. 29;
Dec. 1.

FALCKE *v.* SCOTTISH IMPERIAL INSURANCE COMPANY.

[1885 F. 1145.]

Policy of Life Assurance—Payment of Premiums by Person not sole Beneficial Owner—Lien—Salvage.

E. mortgaged a policy of life assurance to *F.*, and afterwards filed a petition for liquidation. Resolutions of the creditors were passed, under which *E.*'s friends were to pay 2*s.* in the pound on the unsecured debts, and the trustee was to assign to a nominee of the friends all *E.*'s property except the equities of redemption in the securities held by secured creditors. The terms of these resolutions were carried out, and *E.* obtained his discharge. Shortly after this, in 1883, *E.* agreed with *D.*, who professed to be *F.*'s agent, for the purchase of *F.*'s interest in the policy, but no such purchase was ever carried out. Shortly after this agreement *D.* informed *E.* that none of the incumbrancers would pay the premium for that year, and *E.* paid it on the faith, as he deposed, of his interest under the agreement. There was no evidence that *D.* had any authority to enter into any agreement on behalf of *F.*, or that *F.* had any knowledge of the contract or of the payment by *E.* *F.*'s representative, Mrs. *F.*, brought an action to enforce her security, and the policy was sold for much less than the amount of the mortgage debt :—

Held, by *Bacon*, V.C., that *E.* was entitled to be repaid out of the proceeds of sale the premiums for 1883 which he had paid, and that the residue must be paid to Mrs. *F.*

Held, on appeal, that *E.*'s payment of a premium in his character of owner of the equity of redemption could not give him a lien in priority to the mortgage debt; that *E.*'s belief that he had a valid contract for purchase, when he had not, could not give him any advantage as regarded the premium, there being nothing to shew that *F.* knew of the alleged contract or of the payment of the premium; that in this state of the evidence no request from *F.* to pay the premium could be inferred, and no equity could be held to have arisen against *F.* on the ground of acquiescence or lying by; and that the fact that the policy had been preserved by *E.*'s payment did not give him a right to have the premium repaid nor give him a lien on the policy for it.

Held, therefore, that the whole proceeds of sale must be paid to Mrs. *F.* without deducting the premium.

Semble, the maritime doctrine of salvage has no application to the payment of premiums on a policy.

West v. *Reid* (1), *Burridge* v. *Row* (2), *Shearman* v. *British Empire Mutual Life Assurance Company* (3), *Gill* v. *Downing* (4), and *Aylwin* v. *Witty* (5) considered.

IN 1877 a policy of assurance was effected with the *Scottish Imperial Insurance Company* on the life of the *Duchesse de Bauf-*

(1) 2 Hare, 249.
(2) 1 Y. & C. Ch. 183.
(3) Law Rep. 14 Eq. 4.
(4) Ibid. 17 Eq. 316.
(5) 30 L. J. (Ch.) 860.

fremont for £29,000, at an annual premium of £1211 19*s.* 2*d.*, payable on the 31st of July, with a month's grace allowed. This policy was purchased by *E. Emanuel* in 1879.

James Falcke put £6500 in the hands of *Benn Davis*, a solicitor, for investment. *Davis* lent £6000 of this sum to *Emanuel*, who, on the 9th of January, 1880, executed a bond to *Falcke*, and also by deed charged the above policy and some reversionary property of little value with the payment to *Falcke* of the £6000 and interest. By this deed *Emanuel* covenanted with *Falcke* to pay the premiums on the policy, and to repay on demand with interest all moneys which *Falcke*, his executors, administrators, or assigns should expend in keeping it up. At the time when this security was given the policy was subject to a mortgage to the insurance company for £1000, and in 1881 and 1882 *Emanuel* gave them further charges for £650 and £300, to which *Falcke* and some incumbrancers subsequent to him postponed their securities.

In September, 1882, *Emanuel* filed a petition for liquidation. On the 10th of January, 1883, a special resolution was passed by the creditors accepting a proposal made by friends of the debtor that the friends should pay a dividend of 2*s.* in the pound on the provable debts, and that the trustee should assign to the friends of the debtor, or to such persons as the solicitors, through whom the proposal was made, might direct, all the property of the debtor except the equities of redemption in the securities held by secured and partly secured creditors, and that the discharge should be granted forthwith, but not reported till the above arrangement had been carried out.

The arrangement was carried out, and on the 19th of March, 1883, the order of discharge was granted. *Falcke* had not proved, and the transaction appeared to have been carried through on the footing of treating all creditors who held any security as being sufficiently secured.

In 1883 *Emanuel*, through *Davis*, paid the premium on the policy which became due on the 31st of July in that year, and he deposed that he also paid the premium which became due in July, 1884.

Falcke died on the 9th of January, 1885. In April, 1885, *Davis* absconded, and was adjudged a bankrupt. The Plaintiff,

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who was *Falcke's* executrix, commenced this action in July, 1885, against the insurance company, *Emanuel*, and others, to enforce her security. On the 18th of August the policy was sold under an order made in the action, and the purchase-money, amounting to £4000, was paid into Court. After payment of the claims of the insurance company there remained a residue of £1722 18*s.* 10*d.*, and the question was, who was entitled to this sum? *Emanuel* took out a summons for payment of it to him on two grounds. First, he alleged that he had purchased *Falcke's* interest in 1883. He deposed that, after obtaining his discharge, he entered into negotiations with *Benn Davis*, who had acted for *Falcke* and the other incumbrancers on the policy in the liquidation proceedings, for the purchase of their interests; that *Davis* gave him to understand that none of them would find the next premium; that he thereupon offered to *Davis*, and *Davis*, on behalf of his clients, agreed to accept £50 for the purchase of "the equity of redemption" in the policy; and that he paid this sum. That on the faith of this agreement he (*Emanuel*) paid the 1883 premium. That it subsequently appeared that *Falcke* could not, without the consent of all the subsequent incumbrancers, execute a valid assignment of the equity of redemption, and when the premium for 1884 fell due he (*Emanuel*) paid it under the advice and on the request of *Davis*, as representing the subsequent incumbrancers. Secondly, that at all events he was entitled to be repaid the two premiums for 1883 and 1884, as paid by him with the knowledge or privity or with the acquiescence of all parties claiming an interest in the policy, including *Falcke*, for the purpose of keeping on foot the policy, which would otherwise have been lost.

The Plaintiff took out a cross-summons, asking to have the whole sum paid to her.

The premium for 1884 was paid by *Benn Davis*, but in the opinion of Vice-Chancellor *Bacon*, who tried the case, there was no sufficient evidence that the payment was made on behalf of *Emanuel*. His Lordship held, however, that *Emanuel* was entitled to be repaid out of the proceeds of sale the premium of 1883, which he had paid, as without that payment the policy would have been lost, and he was not a mere stranger, but had an

interest real or supposed. The balance was ordered to be paid to the Plaintiff.

The Plaintiff appealed from this order, asking that the whole balance of the purchase-money, after satisfying the claims of the insurance company, might be paid to her.

It was not in any way shewn that *Davis* had authority to contract on behalf of *Falcke* for the sale of his interest. It was not alleged that *Falcke* had ever asked *Emanuel* to pay either of the two premiums, and there was, in the opinion of the Court of Appeal, nothing to shew that he was aware of their being paid, or had any cognizance of the transactions in 1883 and 1884.

Jelf, Q.C., and *Bonsey*, for the Appellant:—

In order to establish any claim *Emanuel* must prove that he had an interest in the policy as purchaser of *Falcke's* interest when he paid the premiums, or that *Falcke* requested him to pay them. No such request is proved. The Vice-Chancellor thought that if *Emanuel*, though having no interest, believed himself to have an interest, that was enough. That proposition, we contend, is erroneous. The supposed interest, arises from the negotiations between *Emanuel* and *Benn Davis* for the purchase of *Falcke's* interest. The Vice-Chancellor's judgment proceeds on the footing that there was no effectual contract of purchase, for it directs payment of the surplus to the Plaintiff. There being no cross-appeal, the Respondent then cannot now be heard to say that he had effectually purchased *Falcke's* interest. Now a man cannot by paying a debt due from *A. B.* without any request from *A. B.* make himself *A.B.'s* creditor, and, *à fortiori*, he cannot, by so doing, give himself a lien on property. The law as to the right to have premiums repaid is summed up in *In re Leslie* (1). It is there laid down that in four cases only does a person not the sole beneficial owner obtain a lien for premiums which he pays: (1) by contract with the beneficial owners; (2) by reason of the right of trustees to an indemnity for money expended by them in preserving the trust property; (3) by subrogation to the rights of trustees of some person who at their request has advanced money to preserve the property; and (4) by reason of the right

(1) 23 Ch. D. 552.

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of a mortgagee to add to his security money expended in preserving the mortgaged property. The other side may perhaps rely on the reference near the end of the judgment (1) to "any mistake as to his title to the policy," but there is no intimation that such a mistake would have been enough to give him a lien. The Vice-Chancellor appears to have been led to his conclusion by *Shearman* v. *British Empire Mutual Life Assurance Company* (2) and *Burridge* v. *Row* (3). The former of these cases is explained in *Saunders* v. *Dunman* (4), and *Burridge* v. *Row* in *In re Leslie* (5). *Clack* v. *Holland* (6) illustrates the general rule. Subject to any authorities that may be discovered by the Respondent, *Emanuel*, if there was no purchase, has no more right to a lien than any stranger who chose to pay the premiums. On the evidence there was no good purchase.

[COTTON, L.J.:—The Vice-Chancellor has so decided, and there being no cross-appeal we ought not to call upon you to go into that.]

Then as to the payment having saved the property: the notion of salvage appears to have first arisen in *In re Tharp* (7), but that case is explained in *In re Leslie*. The expression "salvage" does not occur again till *Aylwin* v. *Witty* (8). That case itself came within the rules in *In re Leslie*, and the Vice-Chancellor doubted whether there was any such doctrine as salvage applicable to these cases. The expression then occurs in *Shearman* v. *British Empire Mutual Life Assurance Company*. It is wrong to talk of salvage in such cases. There is no analogy: if the principle were that of maritime salvage, the person making the last payment would have priority over every one else.

Marten, Q.C., and *Oswald*, for the Respondents:—

We contend that the evidence proves a contract by *Emanuel* for the purchase of *Falcke's* interest. But if the Court is against us on that, we say that *Emanuel* has a claim in the nature of salvage for the premiums by the payment of which he preserved

(1) 23 Ch. D. 565.
(2) Law Rep. 14 Eq. 4; 41 L. J. (Ch.) 466.
(3) 1 Y. & C. Ch. 183.
(4) 7 Ch. D. 825.
(5) 23 Ch. D. 552.
(6) 19 Beav. 262.
(7) 2 Sm. & Giff. 578, n.
(8) 30 L. J. (Ch.) 860.

the property. *West* v. *Reid* (1) supports that view. Lord Justice *Fry*, in *Saunders* v. *Dunman* (2), treats this case as of no authority because the point was given up at the bar, but the judgment does not shew that it went on the concession of the other side. Then *Emanuel* was not a stranger when he paid the premiums, he had a contract which, whether he could have enforced it or not, he relied upon as giving him an interest. Again, if a party adopts and enjoys the benefit of what has been done by another person, his request will be presumed.

[BOWEN, L.J.:—The law is so laid down in *Smith's* Leading Cases (3), in the notes to *Lampleigh* v. *Brathwait* (4), but it seems to be stated too widely. If that were the law salvage would prevail at common law as well as in maritime law, which it certainly does not.]

But the conduct of the party may be such that a request will be implied. There was an acquiescence here by the other parties in a payment made by *Emanuel* under the belief that he had a title, and the observations in *In re Leslie* (5) are in favour of a lien being so created. *Emanuel* must have paid the premiums in respect of his right under the contract; he had no other title, for after the liquidation he had no interest in the equity of redemption.

[COTTON, L.J.:—I do not agree with that proposition.]

In *Burridge* v. *Row* (6) the person who paid the premiums was held entitled to a lien, though his title to the whole benefit of the policy was negatived. *Shearman* v. *British Empire Mutual Life Assurance Company* (7) is in point and is in our favour, as also *Gill* v. *Downing* (8). *Aylwin* v. *Witty* (9) also supports our contention. *Clack* v. *Holland* (10) is referred to against us, but it merely determines that a trustee who has funds in hand for keeping up a policy cannot get a lien for what he advances out of his own moneys for that purpose, and that is not against us.

Beddall, for *Emanuel's* trustee in bankruptcy.

(1) 2 Hare, 249.
(2) 7 Ch. D. 825, 829.
(3) 8th Ed. vol. i. p. 158.
(4) Ibid. 151.
(5) 23 Ch. D. 552.
(6) 1 Y. & C. Ch. 183.
(7) Law Rep. 14 Eq. 4.
(8) Ibid. 17 Eq. 316.
(9) 30 L. J. (Ch.) 860.
(10) 19 Beav. 262.

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COTTON, L.J. :—

This is an appeal by Mrs. *Falcke*, the representative and widow of the late Mr. *Falcke*, against an order of Vice-Chancellor *Bacon*, who allowed the Respondent, the Defendant Mr. *Emanuel*, a payment of £1211 19*s.* 2*d.* made by him in respect of a premium on a policy of insurance for £29,000.

The facts, stated shortly, are these. Mr. *Emanuel* had purchased this policy, and then mortgaged it to the office, he subsequently mortgaged it to Mr. *Falcke* under these circumstances: Mr. *Falcke* had dealings with Mr. *Benn Davis*, who formerly carried on business as a solicitor in *London*, and apparently Mr. *Falcke* put the whole of his money, £6500, in his hands for the purpose of investment. *Emanuel* had transactions with *Davis*, and he got £6000 of this money from *Davis*, and he gave to *Davis* an assignment to *Falcke* of the policy as security for the £6000 subject to the previous charge to the office. *Emanuel* subsequently mortgaged this policy to other persons, and then in the year 1883 he became insolvent, and filed a petition for liquidation. Then there was a composition by which certain of his creditors (a sufficient number I presume) agreed to take 2*s.* in the pound, but under the resolutions those creditors who had securities on this policy were to take to their securities, and not to have the 2*s.* in the pound. That 2*s.* in the pound was paid. There was a provision in the resolutions that all the property of the debtor, *Emanuel*, except the equities of redemption in the properties on which creditors held securities, which exception would include this policy, should be assigned to his friends who provided the 2*s.* in the pound. This policy, then, not being expressly provided for, the equity of redemption in it, which had vested in the trustee under the liquidation petition, became subject to the ordinary law, according to which when the composition was paid and *Emanuel* was entitled to his discharge he would be entitled to a reassignment from the trustee in the liquidation. Thus he was ultimate owner of the equity of redemption in this policy, subject to various charges.

But there is another transaction to be referred to. In the autumn of the year 1883 (the debtor having obtained his order of discharge in March) letters passed between him and *Davis*,

under which there was (if *Davis* was authorized to sell) a contract which I will take to be, as the Respondent contends, a contract for the sale of *Falcke's* interest in the policy to *Emanuel* for £50. That contract has never been carried into effect, and the Vice-Chancellor's judgment has treated it as ineffectual, for he has ordered that Mrs. *Falcke* as the representative of *Falcke* shall have the balance of the moneys produced by the sale of the policy after satisfying the claim of the office, and after providing for £1211 19*s.* 2*d.* paid by *Emanuel* in August, 1883, for a premium then becoming due on the policy. The question is, was the Vice-Chancellor right in directing that £1211 19*s.* 2*d.* to be repaid to *Emanuel*?

Now let us see what the general law is. It is not disputed that if a stranger pays a premium on a policy that payment gives him no lien on the policy. A man by making a payment in respect of property belonging to another, if he does so without request, is not entitled to any lien or charge on that property for such payment. If he does work upon a house without request he gets no lien on the house for the work done. If the money has been paid or the work done at the request of the person entitled to the property, the person paying the money or doing the work has a right of action against the owner for the money paid or for the work done at his request. If here there had been circumstances to lead to the conclusion that there was a request by *Falcke* that this premium should be paid by *Emanuel*, then there would be a claim against *Falcke* or his representative for the money, and I do not say that there might not be a lien on the policy. But in my opinion there is no evidence upon which we should be justified in coming to the conclusion that there was any request expressed or implied by *Falcke* to *Emanuel* to pay this money. An express request is not suggested. Was there an implied request? I think that in a case of this sort, when money is paid in order to keep alive property which belongs to another, a request to make that payment might be implied from slight circumstances, but in my opinion there is no circumstance here in evidence from which such a request can be implied.

The Respondent put the case on the broad ground, that if any one takes advantage of a contract entered into by another he

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adopts the contract, and is bound by it. Thus, if *A.* buys something for *B.*, and *B.* takes the subject of that contract, then he is bound to pay *A.* or the shopkeeper who supplies the articles. Yes, but in that case *B.'s* acceptance of the goods is a ratification of the authority to order goods in *B.'s* name on which *A.* wrongfully assumed to act. In the present case it is not shewn that *Falcke* had any knowledge of the negotiations between *Davis* and *Emanuel*, and it is not possible to infer that *Falcke* either authorized or afterwards adopted the payment of the premium. It must be remembered that Mrs. *Falcke*, although she gets the benefit of the payment, is not taking advantage of any contract then entered into between *Davis* and *Emanuel* in respect of which *Emanuel* paid the premium, but she is taking advantage of the contract effected by the policy of insurance which was assigned to *Falcke* by *Emanuel*. It is very true that she gets an incidental benefit from the payment made, but that is not the contract she is seeking to enforce. She is seeking to enforce the contract entered into by the person who effected the policy.

Let us examine the other grounds. The Vice-Chancellor appears to have thought that the payment was made by *Emanuel* by reason of a contract which he had with *Falcke*, and therefore that though effect could not now be given to that contract he was entitled to be repaid. If that was the Vice-Chancellor's view with great respect I must differ from him. There is no evidence to shew that *Falcke* authorized the contract between *Davis* and *Emanuel*. It is said that he must be assumed to have authorized it, because he left everything to *Davis*. But even if he did leave everything to *Davis* as regards the investment of his money that would not give an authority to *Davis* to realize the investments by sale. In my opinion there is nothing to support the contention that *Davis* was authorized to enter into a contract for sale to *Emanuel*, and that being so, what right can the belief of *Emanuel* that he had a contract give to him as regards these payments? None. It is very true that if a man who has a title to property sees another expending money upon it in the erroneous belief that he has a title to it when in fact he has no title, there is an important doctrine of Equity which will prevent the real owner from insisting on his title so as to deprive the person who

was acting on the supposition of his own title of the benefit of his expenditure. But in order to make this doctrine applicable, there must be not only knowledge on the part of the person having the real title that the man whom he sees so acting believes he has a title and acts in consequence of that belief, but also a knowledge that the title on the faith of which he is acting is a bad one. But there is nothing here to shew that this contract which was entered into by *Emanuel* was in any way known to *Falcke*, and in my opinion the mere fact that *Emanuel* thought it was a good contract, and that he paid his money in that belief, cannot give him any right as against *Falcke*.

But what was the position of *Emanuel* at the time? He was, in my opinion, owner of the ultimate equity of redemption. Does that give him a right to have this sum paid by him for premium repaid to him out of the moneys arising from the policy? In my opinion it does not. It would be strange indeed if a mortgagor expending money on the mortgaged property could establish a charge in respect of that expenditure in priority to the mortgagee. It is true that here the mortgagor, the ultimate owner of the equity of redemption, was no longer personally liable to pay the sums charged on the policy and was not bound by the covenant to pay the premium, but he pays it as the owner of the equity of redemption entitled to the ultimate interest in the property, although not personally bound to pay the debt or provide for the premium. It must be considered, in my opinion, that he paid it not so as to get any claim in priority to the incumbrancer, but in order to retain the benefit of the interest which would come to him if the property proved sufficient to pay off the previous incumbrancers. In my opinion it would be utterly wrong to say that a mortgagor, the owner of the equity of redemption, can under those circumstances defeat the incumbrancers on the estate. Suppose the mortgaged property is a mine, and the owner of the equity of redemption were to spend large sums of money in order to prevent the mine being flooded or otherwise destroyed, could he have in respect of that expenditure a lien on the estate as against the persons having charges and mortgages on that estate? In my opinion, no. But then it is said, that as regards policies of insurance

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there are authorities which lead to a different conclusion and establish that moneys paid for premiums must be allowed before the incumbrancer can claim. The earliest authority that was referred to was *West* v. *Reid* (1). There, undoubtedly, persons who had not got a title to the policy were allowed the sums which they had paid to keep it on foot. But under what circumstances? There was a mortgage which was not effectual as against the assignees in bankruptcy in consequence of notice not having been given, but before the life had dropped, when the policy was still running, the solicitor acting for the mortgagees wrote to the solicitors of the assignees recommending that a sale of the policy should be carried into effect, and stating that the annual premium was on the point of becoming due and offering to pay it in order to keep the policy on foot if authorized to do so by the assignees. There was a change of assignees, and then the solicitors of the new assignees declined to interfere as regards the sale or the payment of the premium. The mortgagee went on paying the premium for some years till the life dropped. Under those circumstances, I think it might well be held that there were circumstances from which the law would imply a request or a contract to pay these premiums if the policy ultimately turned out to belong to the assignees and not to the party making the payment. The point does not seem to have been argued, but was given up by counsel for the assignees in the progress of the case.

Then *Burridge* v. *Row* (2), before Lord Justice *Knight Bruce*, when Vice-Chancellor, was referred to. His opinion was clearly against the contention on behalf of *Emanuel*. What he says is this: "From whatever motive Alderman *Winchester* paid these premiums, if they were not paid by means of any contract with the trustees or with Mr. *Burridge* or his wife, the consequence of those payments would not be the acquisition of the property in the policies by Alderman *Winchester*." It is said that this meant that Alderman *Winchester* would not get the property, but only have a lien. That cannot be what was meant, for how could Mrs. *Burridge*, the tenant for life, possibly by any contract which she made with *Winchester* give him a title to the policies? Neither she nor the trustees could do so, but *Winchester* might, no doubt,

(1) 2 Hare, 249. (2) 1 Y. & C. Ch. 183, 191.

by contract with them acquire a lien on the property for any sums properly paid by him in order to preserve it. Then he proceeds: "Nothing that has been stated to me has had the effect of persuading me that, without any contract for that purpose, the mere fact of making payments of the premiums, however necessary that might be for the preservation of the property, would give the party making those payments a title to the property. I am not aware that there is any authority or principle in support of any such proposition. I must therefore, hold, that Mrs. *Burridge's* life interest in the policy fund exists in her, not affected in any way by what has been done, except to this extent, that if there be any dispute whether or not Alderman *Winchester* was repaid the amount of the premiums by means of the detention of the income which he was liable to pay to Mrs. *Burridge*, there must be an inquiry on that point." Then follow in brackets the words, "It was here stated at the Bar that he was repaid." Then the Vice-Chancellor goes on: "Then that fact must appear on the decree. It then remains to consider the title of Mrs. *Burridge* to compensation, or indemnity, in respect of the payments which she has made, and which her husband's estate was liable to make." She had been formerly married to Mr. *Row*, who was bound to pay the premiums on these policies, and the Vice-Chancellor is there treating her as having (in consequence of Alderman *Winchester* being repaid out of her income) herself, out of her income, paid these premiums. "It is, as I understand, proved in the cause, that Mrs. *Burridge*, out of her income, or by means of deductions out of her income, has actually paid the premiums, to a certain extent, on the policies which his estate was liable to pay. I must, therefore, declare, that the plaintiff, Mr. *Burridge*, in right of his wife, has, in respect of the sums charged against her for these premiums, a lien upon *Row's* interest under the settlement, whether it has been assigned or not to Alderman *Winchester*." Therefore the tenant for life having repaid to *Winchester*, who actually paid the premiums, the amount of those premiums, was held entitled to a lien as against the interest of *Row* under the settlement, *Row* having bound himself to make those payments; and the decree carries that into effect. The Court refused in any way to recognise the title of *Winchester*,

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but treated the right of the tenant for life, Mrs. *Burridge*, as good to this extent, that she had a lien as against the interest of *Row* under the settlement for premiums paid by her which he was bound under the settlement to provide for.

The next case was *Shearman* v. *British Empire Mutual Life Assurance Company* (1). There undoubtedly the Master of the Rolls gave to a bankrupt mortgagor credit for premiums paid after the bankruptcy, and a lien for the amount of the premiums, but for what reason does not appear at all on the report. All that the reporter has told us is this that, the Master of the Rolls said that the plaintiff, the mortgagee, was clearly entitled to the policy moneys, but that the premiums paid subsequently to the bankruptcy were in the nature of salvage moneys, and the plaintiff must repay them to the legal personal representative of the mortgagor with interest upon them. Lord Justice *Fry*, in *Saunders* v. *Dunman* (2), has suggested, and I think it is highly probable that is the correct explanation, that the decision went on the ground that previously to the institution of the suit the plaintiff, the mortgagee of the policy, had offered to pay the legal personal representative a sum larger than the amount of the premiums, with interest thereon at 4 per cent. That very probably is the ground of the decision. But if the Master of the Rolls meant to express an opinion that a person having no interest in a policy can by payment of the premiums acquire a lien on the policy, I am bound to say that I differ from that view.

The next case was *Gill* v. *Downing* (3), which was a very peculiar case. A married woman who was tenant for life, with a restraint on anticipation, of trust property which included a policy of assurance, had power after her life estate to appoint by deed or will the trust property. By deed she appointed the policy for the benefit of mortgagees, and declared that the mortgagees should be paid out of the policy moneys not only the money advanced, with interest and costs, but also any sum that they paid for premiums. The policy became payable, and the mortgagees who had paid premiums to keep the policy on foot filed their bill to enforce their security. The mortgage debt could

(1) Law Rep. 14 Eq. 4. (2) 7 Ch. D. 825, 829.
(3) Law Rep. 17 Eq. 316.

not be paid till after the death of the tenant for life, because there was a restraint on anticipation, but Vice-Chancellor *Hall* gave to the mortgagees who had paid the premiums immediate payment of the sum which they had expended for payment of the premiums. That I think is explained by this, that though there was a restraint on anticipation which prevented payment of the sum charged during her lifetime, yet in the settlement there was a provision that the trustees might, if they should think fit, apply any part of the income, or if that should be insufficient any part of the capital, in payment of the premiums. It is very true that the trustees had declined to do this, but as that power to do so was given to them the Vice-Chancellor considered that it was right for him in the exercise of that power to pay immediately the sums which had been paid for premiums. In support of that view Lord Justice *Fry* has pointed out to me that at the time of the mortgage and the settlement the policy had been handed over by the trustees to the plaintiff, as if substituting him in their place for the purpose of dealing with the income with reference to the payment of premiums. The real explanation of the case, in my opinion, is not that permission was given to persons who paid those premiums without authority to claim a lien for the amount of the premiums either on the income or the capital, but that the only question was whether payment was to be made to them immediately, notwithstanding the restraint on anticipation. That restraint on anticipation would not have prevented the trustees from paying the premiums, and it did not prevent repayment to the mortgagees who paid them.

The only other case, I think, which need be referred to is *Aylwin* v. *Witty* (1), in which the Respondents contended that Vice-Chancellor *Kindersley* laid down a rule which would justify the order now under appeal. But I can find nothing in that case to support the Respondents' argument. The Vice-Chancellor there refused to apply the doctrine alleged by the respondents to be essentially applicable to these cases, that a person whose expenditure has saved the property has a lien. In that case there was a contract in a deed which authorized the payment by the trustee of premiums as against the owner *Trimmer*, the

(1) 30 L. J. (Ch.) 860.

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authority being continued only until a certain mortgage debt was paid. *Trimmer* and two sureties covenanted for payment of the premiums. There was a subsequent assignment of the equity of redemption to a trustee for *Trimmer's* creditors. *Trimmer* failing to pay the premiums, the sureties paid them. The Vice-Chancellor considered that the trustee for *Trimmer's* creditors took subject to the provisions in the first deed as to payment of premiums; that under the first deed if the sureties paid the premiums they had a lien on *Trimmer's* interest under it, and that the creditors therefore could not take the proceeds of the policies without re-paying the premiums. In my opinion that case in no way assists the contention of the Respondents.

With the greatest respect for the view of Vice-Chancellor *Bacon* I must hold here that the balance of the money received under this policy, after paying the office who were the first mortgagees, must be paid to Mrs. *Falcke* without any deduction in respect of the premium paid by Mr. *Emanuel*.

BOWEN, L.J.:—

I am of the same opinion. The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.

There is an exception to this proposition in the maritime law. I mention it because the word "salvage" has been used from time to time throughout the argument, and some analogy is sought to be established between salvage and the right claimed by the Respondents. With regard to salvage, general average, and contribution, the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils,

and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea.

With regard to ordinary goods upon which labour or money is expended with a view of saving them or benefiting the owner, there can, as it seems to me, according to the common law be only one principle upon which a claim for repayment can be based, and that is where you can find facts from which the law will imply a contract to repay or to give a lien. It is perfectly true that the inference of an understanding between the parties—which you may translate into other language by calling it an implied contract—is an inference which will unhesitatingly be drawn in cases where the circumstances plainly lead to the conclusion that the owner of the saved property knew that the other party was laying out his money in the expectation of being repaid. In other words, you must have circumstances from which the proper inference is that there was a request to perform the service. It comes to the same thing, but I abstain the using the word "request" more than is necessary, for fear of plunging myself into all the archaic embarrassments connected with the cases about requests. But wherever you find that the owner of the property saved knew of the service being performed, you will have to ask yourself (and the question will become one of fact) whether under all the circumstances there was either what the law calls an implied contract for repayment or a contract which would give rise to a lien?

Now in the present case how can it be said that Mr. *Falcke*, whose representative is claiming the benefit of this policy, so conducted himself as to justify any inference of the kind on the part of Mr. *Emanuel?* There is absolutely no fact from which any such inference, as it seems to me, can be drawn at common law.

But then it is said that though at the time there may have been no such implied contract, nevertheless the subsequent attempt on the part of Mr. *Falcke's* representative to take the benefit of the preserved policy makes her, by virtue of something in the nature of adoption or ratification, liable to repay the money expended. There is nothing more vague than the way in which the word "adoption" is used in arguments at law, and sometimes

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ambiguous language used about adoption is imported into arguments about ratification. There is no such thing in law as adopting or ratifying anything except where there is the sanctioning of an act professedly done on your behalf in such a sense as to make you liable for it. A man can ratify that which purports to be done for him, but he cannot ratify a thing which purports to be done for somebody else. Ratification only takes effect in law from its being equivalent to a previous authority, and a previous authority is an incident which only arises in the relation of principal and agent. There have been many attempts to make people liable by what is called adoption of a contract, or of some other act which never purported to be made or done on their behalf, and such attempts have failed. I may instance as a leading type of that class of cases the attempts that have been made of late to make companies liable for contracts entered into by promoters.

Now the first observation with regard to the attempt to make Mr. *Falcke's* estate liable on the ground that his representative has taken the benefit of what *Emanuel* has done, is that what *Emanuel* did was not done for *Falcke's* estate. Still, if he or his representative took the benefit of it under such circumstances as raise the proper inference of a fresh contract to pay, that would be altogether a different matter. But when we come to examine the case there is not a single fact which raises the slightest presumption that there was any intention at any time, either before Mr. *Falcke's* death or afterwards, on the part of those who were negotiating with Mr. *Emanuel*, to ask him to pay this sum of money. So much, therefore, for the idea of a lien or even of a right to be repaid this sum at common law.

Now in equity what is there here to give rise to any such right? The cases in equity were examined by Lord Justice *Fry* in *In re Leslie* (1), and the general rule is the same in equity as at law. What have we here to take this case out of the general rule? Mr. *Emanuel* was the owner of the equity of redemption. Does the mere fact that the owner of the equity of redemption paid premiums to keep alive the policy give him a right against the mortgagees to have the moneys which he so expended paid

(1) 23 Ch. D. 552.

in priority to their debt? He paid in his own interest; he did not pay in the interest of the mortgagees. There can be no question here of acquiescence. The mortgagor does not pay under a mistake of fact or any mistake as to his own title. The mortgagee does not stand by and allow him to pay under such a mistake, and as regards any notion that he was allowed to pay under the expectation that he would be repaid again, or would have a lien for the money upon the policy, I have examined that already in the first part of the observations I have been making. If there were any acquiescence of this last kind, it would be an acquiescence from which in common law you would draw the inference of a contract; but, as I said before, there is no fact that leads to that.

Then, what equity is there that can be relied upon? It is not even a case where the owner of the saved property requires the assistance of a Court of Equity, or the name of the person who has paid that money to get the property back. Here the simple question is whether there are any facts from which we can say that it is unjust or inequitable that Mr. *Falcke's* representatives should be allowed to have that which is their own? If you state the case in that way the answer is obvious, that one cannot see anything of the kind.

FRY, L.J.:—

I also feel myself unable to concur in the judgment of the learned Vice-Chancellor, but, having regard to the respect which we all feel for his judgments, it is proper that I should add a few words to explain the grounds upon which I differ from his conclusion.

The controversy arises with regard to the payment in the month of August, 1883, of a premium upon a policy originally taken out in the name of the *Duchesse de Bauffremont*. At that time the policy was vested in Mr. *Emanuel* as the owner of the equity of redemption in it. It was subject to a charge in favour of the company, to a charge in favour of Mr. *Falcke*, and to charges in favour of other persons. That being the position of the policy, the person entitled to the equity of redemption in that policy pays the premium.

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Now, *primâ facie*, it appears to me to be plain that a payment of money to maintain property made by a mortgagor gives no right or lien to the mortgagor as against his mortgagee, and therefore Mr. *Falcke*, or Mrs. *Falcke* as representing him, has a plain *primâ facie* title to the policy-money to the extent of her mortgage, free from any such claim.

On what grounds does Mr. *Emanuel* support his claim? It is not very easy to say in the multiplicity of words which have been used what is the exact nature of the grounds that he alleges; but it appears to me to be plain that the question we have to determine must resolve itself into one either of contract or of acquiescence.

In the first place let me observe that I exceedingly doubt whether a mere request by a mortgagee to his mortgagor to pay a sum of money, though it might give rise to an action for the recovery of the sum paid, would create a lien as against the mortgagee upon the property saved by the payment. But it is not necessary to discuss that point, because in the present case there is no evidence on which we can act that any request was made by Mr. *Falcke*, or by any agent of his, to Mr. *Emanuel* to make this payment. It is said that Mr. *Benn Davis* made the request, and that Mr. *Benn Davis* was the agent of Mr. *Falcke* to make such a request. Now, the only evidence in support of that is a statement, which is no doubt true, that Mr. *Falcke* had placed some large sum of money, £6500 or more, in the hands of Mr. *Benn Davis* for the purpose of investment; but an agent to invest a sum of money has not by force of the agency any right to make to a mortgagor a request to pay money, which shall bind the mortgagee. There is, therefore, I think, nothing whatever to shew that any such request was made which bound Mr. *Falcke*.

But, then, is there any contract by Mr. *Falcke* that he will give to Mr. *Emanuel* making the payment a lien upon the mortgage property in priority to the mortgage debt? I am unable to find any evidence whatever of such a contract. The observation I have already made applies, even if Mr. *Benn Davis* did enter into such a contract, of which I see no evidence. There is a total want of evidence of authority on Mr. *Davis's* part to bind Mr. *Falcke*, and therefore I fail to see any evidence whatever of such a contract.

But then it is said that when one person makes an outlay upon property, and another person takes the benefit of that outlay, a request is implied, and the person who takes the benefit must pay the money, or submit to a lien upon the property benefited for the repayment of the money. To apply that general proposition to the relation which we are now considering, that of mortgagor and mortgagee, would amount to saying that the mortgagor remaining in possession would be entitled to a lien against his mortgagee, and in priority of the mortgage money, for every sum which is expended in the repair or the improvement of the estate, and of which the mortgagee by entering into possession might take the benefit. Such a proposition is untrue to the knowledge of every one in whose hearing I am speaking.

Then is there any case of acquiescence by Mr. *Falcke* in *Emanuel's* payment which can bind Mr. *Falcke's* estate? If it had been shewn that *Emanuel* made a mistake with regard to the title which he had in this property, and believed himself to have a larger title than he had, which would have given him the benefit of the money, that was laid out, and then there was the laying out of the money as in fact there was, and if then it had been shewn that *Falcke*, knowing his own title and knowing *Emanuel's* mistaken belief in his supposed title, had lain by whilst *Emanuel* was laying out this money, then, under those circumstances, there probably would have been a strong case on the ground of acquiescence; but in the present case nearly all the elements are wanting. It is not shewn that *Emanuel* made any mistake with regard to his own title, or that he assumed that he had any greater right than that which he really possessed, or that he laid out this money under the belief that he would reap the fruits of it by virtue of any such title which he supposed himself to possess; still less is it shewn that *Falcke* had any knowledge of the mistaken belief in which *Emanuel* was acting, nor is it shewn that *Falcke* in any way acquiesced in, stood by, or encouraged *Emanuel* in making the payment which *Emanuel* did make.

It appears to me, therefore, that all the ingredients, excepting the mere bare fact of the payment, which would be necessary to constitute a case of acquiescence such as to prevent *Falcke*

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asserting his right as mortgagee, are wanting in this case. I think, therefore, that the Respondents' case entirely fails.

I would make only one other observation. We have heard a great deal on both sides of what has been called the doctrine of salvage. I, like Vice-Chancellor *Kindersley*, exceedingly doubt whether that word can with any propriety be applied to cases of this description. With regard to salvage in the case of ships and maritime perils we know its meaning. It appears that the expression "salvage moneys," as we are informed by one of the learned counsel for the Appellant, and I dare say he is quite right, first occurs in the report of the case of *In re Tharp* (1) which was before Lord *St. Leonards* in 1852, where he seems to have used the expression as one familiar to the Irish Courts in certain cases. I certainly wish that the expression had remained on the other side of the channel where it seems to have arisen. I doubt whether any doctrine which is expressed by the word "salvage" applies to cases of this description.

On the whole, therefore, I come to the conclusion that Mr. *Falcke's* title as mortgagee has not been displaced by any contract entered into by him or by any acquiescence on his part, and consequently that the title to the whole mortgage money was in him. Therefore this appeal must be allowed.

Solicitors for Plaintiff: *Longbourne & Stevens.*
Solicitors for *Emanuel: Harper & Battcock.*

(1) 2 Sm. & G. 578, n.

H. C. J.

In re TAYLOR.
CLOAK *v.* HAMMOND.

C. A.
1886
Dec. 6, 7, 8.

[1884 T. 2268.]

Will—Construction—Misdescription—Parol Evidence—Cousin.

A testatrix gave a share of her residue to her "cousin, *Harriet Cloak*." She had no cousin of that name, but she had a married cousin, *Harriet Crane*, whose maiden name was *Cloak*; and she had a cousin, *T. Cloak*, whose wife's name was *Harriet*:—

Held, that extrinsic evidence was admissible to shew the testatrix's knowledge of and intimacy with the members of the *Cloak* family.

And *held*, by the Court of Appeal (*dissentiente Bowen*, L.J.), reversing the decision of *Pearson*, J., that "cousin" might be understood in a popular sense as the wife of a cousin; and that *Harriet*, the wife of *T. Cloak*, was entitled to the share of the residue.

Grant v. *Grant* (1) distinguished.

THE question in this case arose on the construction of the will of *Elizabeth Taylor*.

The will was dated the 17th of February, 1872, and the testatrix thereby, in exercise of a power of appointment given to her by her father's will, gave certain leasehold tenements, subject to her husband's life interest, to five persons whom she described as her "cousins," and who were all her first cousins, and gave the residue of her real and personal property in these words, "to my cousins *Mary Voy* and *Harriet Cloak* in equal shares as tenants in common."

The testatrix died in 1876, and her husband in 1883, and this action having been brought for the administration of her estate, a moiety of the residue was claimed by two persons, namely, *Harriet Cloak*, who was herself no relative of the testatrix, but was the wife of *Thomas Cloak*, a first cousin of the testatrix, and *Harriet Crane*, who was a first cousin of the testatrix, being a sister of *Thomas Cloak*, but who had married a Mr. *Crane* about twenty-five years before the date of the will.

From the affidavits it appeared that during a period not definitely specified *Harriet Cloak* occasionally visited the testatrix at *Gravesend*, where she resided; and that *Maria Cloak*, a sister of

(1) Law Rep. 5 C. P. 727.

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Thomas Cloak, who also sometimes visited her, in answer to an inquiry by the testatrix, wrote her a letter dated the 1st of August, 1871, as follows:—"I write according to your request to let you know how many of our family are living. *Thomas Cloak*, of &c., *Caroline Butcher*, of &c., *Maria Cloak*, of &c. As to my sister *Harriet*, I have made every enquiry and cannot find her." *Maria Cloak* was a legatee under the will, but neither *Thomas Cloak* nor *Caroline Butcher* took any benefit under it. There was also evidence that the testatrix knew that *Harriet*, the sister of *Thomas Cloak*, was married, and had been spoken of in her presence as Mrs. *Crane*. The son and daughter of *Harriet Crane* made affidavits stating that they remembered being taken when young children to *Gravesend* to see the testatrix.

Harriet Crane had recently died.

When the matter came before Mr. Justice *Pearson* his Lordship was of opinion that *Harriet Crane* was entitled to the share of the residue.

Harriet Cloak appealed from this decision.

Lynden Bell, for the Appellant:—

Upon the will itself there is no ambiguity. Although the word "cousin" used *simpliciter* means cousin german, yet when the term is added as the description of a *persona designata*, the name and the description coupled together adequately and accurately describes a person of that name who is a cousin by affinity: *Grant* v. *Grant* (1). That being so, no extrinsic evidence is admissible to explain the meaning of the testatrix: *Sherratt* v. *Mountford* (2). But if there is any ambiguity, the context shews of whom the testatrix was speaking: *Wigram* on Extrinsic Evidence (3); *Smith* v. *Lidiard* (4); *Wells* v. *Wells* (5). If extrinsic evidence is admissible, the evidence is in favour of *Harriet Cloak*. The testatrix had more intimacy with *Harriet Cloak* than with *Harriet Crane*, and the evidence of *Harriet Crane's* son and daughter shew that she must have known that she was married and no longer bore the name of *Harriet Cloak*.

(1) Law Rep. 5 C. P. 727.
(2) Ibid. 8 Ch. 928.
(3) Propositions I. II. III. V.
(4) 3 K. & J. 252.
(5) Law Rep. 18 Eq. 504.

Macmorran, for the representatives of *Harriet Crane*:—

There is no reported case in which "cousin" has been held to include the husband or wife of a cousin. In ordinary conversation the words "nephew" and "niece" are applied to nephews and nieces by affinity; therefore the cases respecting those terms have no application to the present. The leading idea of "cousin" is consanguinity, and it is never applied to those who are not relations in blood. Therefore neither claimant is correctly described, and according to the well established rule, in such a case extrinsic evidence is admissible: not indeed to shew the intention of the testatrix, but to shew the knowledge which she had, and the circumstances under which she made her will. The evidence shews that the testatrix had not had any communication with *Harriet Crane* for many years, and may well have forgotten her husband's name. All the other persons named in the will as cousins were cousins by consanguinity, which shews the meaning which the testatrix attached to the name.

Osler, and *Ingpen*, for other parties.

Lynden Bell, in reply.

COTTON, L.J. (after stating the gift in the will, continued):—

It appears that there is no one who strictly answers the description of "my cousin, *Harriet Cloak*." The Appellant *Harriet Cloak* is the wife of a cousin of the testatrix; and the Respondent, who was the only cousin of the testatrix who was named *Harriet*, was not properly described as *Harriet Cloak*, because although her name was originally *Cloak*, she had married a man of the name of *Crane*.

The first question is whether parol evidence is admissible to enable us to discover which of these two persons was the object of the testatrix's bounty. It was contended that no parol evidence was admissible, because *Harriet Cloak* came strictly within the words of the will, "my cousin, *Harriet Cloak*," and in support of that contention the case of *Grant* v. *Grant* (1) was cited. That case has not always been looked upon favourably. But whatever

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its authority may be, it does not strictly apply to this case, for here we have to interpret the word "cousin" and in *Grant* v. *Grant* (1) the Court had to interpret the word "nephew." It cannot, therefore, be a binding authority in the present case. But, if extrinsic evidence is admissible, what sort of evidence must it be? Evidence of the testatrix's expressions of intention before and after the making of the will is not admissible. Such evidence of intention is only admissible where the words are equally applicable to two or more persons, which is not the case here, where the words are not strictly applicable to any person. But evidence of the surrounding circumstances, and of the state of knowledge of the testatrix is admissible, and what does it shew? It appears that all the other legatees in the will were cousins by consanguinity, and if the testatrix had included all her cousins in the will, or all her cousins of the *Cloak* family, that would have been strong evidence that *Harriet Crane*, who was a member of that family, was intended, but we find that the testatrix before making her will had written to one of her cousins, *Maria Cloak*, inquiring the names of the members of that family, and she received a list including the names of *Thomas Cloak* and *Caroline Butcher*, and yet to neither of these has a legacy been left. It is said that she believed *Thomas Cloak* to be well off, but no explanation is given for the exclusion of *Caroline Butcher*. It also appears that though there was no great intimacy between *Harriet Cloak* and the testatrix, still the testatrix had more knowledge of her than of *Harriet Crane*. There is also evidence that the testatrix knew that her cousin, who had been *Harriet Cloak*, was married. This is shewn by the evidence of *Harriet Crane's* own children, who say they went down to *Gravesend* themselves, where the testatrix resided. It may be said that the testatrix did not know the married name of her cousin who before marriage had been *Harriet Cloak*, but if that was so, the testatrix could easily have described her as "*Harriet*, sister of *Thomas* and *Maria Cloak*." Looking at the evidence, there is nothing so strong in favour of *Harriet Crane* as the evidence in favour of *Harriet Cloak*, and, taking into consideration that *Harriet Cloak* might, though not strictly, be called a cousin, we must, in my opinion, take the name as our guide,

(1) Law Rep. 5 C. P. 727.

and declare that the person who at the date of the will and at the date of the death of the testatrix was named *Harriet Cloak*, and might in some sense, though not strictly, be called a cousin, is the person who answers to the description in the will.

BOWEN, L.J.:—

I have the greatest possible doubt about the case, especially as I differ from the other members of the Court, but I am of opinion that the judgment of Mr. Justice *Pearson* was right. I start with this: the word "cousin" being a term of which the dominant idea is consanguinity, *Harriet Cloak* is not a cousin of the testatrix at all. It is not accurate to say that the wife of one's cousin is, even in a secondary sense, one's cousin. In the case of nephews and nieces a popular meaning has attached to the words, so as to comprehend nephews and nieces by marriage. But I do not think that such a popular meaning has been extended to cousins. We must, therefore, look at the surrounding circumstances to see who was intended. The evidence of familiarity between the testatrix and the two claimants is so slight as to both, that I think it may be set aside altogether. *Harriet Crane* had not been seen by the testatrix for twenty-five years, but the inquiries made by the testatrix shortly before the will was executed shew that she was interested in discovering where *Harriet Crane* was. It certainly seems to have been known to her that her cousin who had been *Harriet Cloak* was married, but the interval of twenty-five years would account for some haziness on that point. Nor would the mistake of calling her *Harriet Cloak* be a startling one, for by birth she was one of the *Cloak* family. On the one side we have a true description as to the consanguinity with an error in the name; on the other side the name is correct, but there is a mistake as to the consanguinity. Which is to prevail? In my opinion, having regard to the other bequests to real cousins which the will contains, the consanguinity is the true key to the construction of the gift, especially as the mistake in the name is only half a mistake. The ground of my decision is that the word "cousin," cannot be used in a secondary or even in a tertiary sense for a person not a relation in blood, though it can be used for a more distant relation than a first

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cousin. Though I am sorry to differ from the other members of the Court, I must give my opinion that *Harriet Crane* is the person entitled.

FRY, L.J.:—

The testatrix gave one moiety of her property to her cousin *Harriet Cloak*. There is no person who strictly fulfils this description. One of the claimants is not a cousin of the testatrix, and the other's name is not *Harriet Cloak*. Which of them is to succeed? It appears to me plain that there is such an ambiguity that evidence may be admitted as to the state of circumstances known to the testatrix. The decision in *Grant* v. *Grant* (1) was based upon the opinion of the Court that the word "nephew" was equally applicable to a man's own nephew and the nephew of his wife. Whether I should have agreed with that view is of no importance, for it does not affect the question in this case. Here neither claimant is accurately described. Is it in the name or in the description as "cousin" that the greatest force or intensity of meaning is to be found? In my opinion the name is that part of the description which is most emphatic. It is more likely that a man, in speaking of another by his name and relationship, would be right in the name than in the relationship. Although *Harriet Cloak* was not a cousin of the testatrix, she was the wife of a cousin, and such a person might be popularly called a cousin. I agree with Lord Justice *Bowen* as to the proper signification of the word "cousin,"—that it properly means the children of brothers and sisters, and implies consanguinity, but I think that it is sometimes used in a loose and vague sense, which does not imply consanguinity, as when the Queen addresses a nobleman, or a member of her Privy Council, as a "cousin," and when we speak of our "country cousins." I think that in popular language the word does apply to persons who are not related by consanguinity. In the present case we must either reject the name of the legatee or else give a secondary or tertiary signification to the word "cousin." I think the latter the more correct course.

Then, when we look at the parol evidence, how does it affect

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the question? The testatrix appears to have had greater knowledge of *Harriet Cloak* than of *Harriet Crane;* and the testatrix must have known that her cousin *Harriet Cloak* had been married several years, and had ceased to be called *Harriet Cloak.* Knowing this, is it conceivable that she would have described her as *Harriet Cloak?* The supposition is so improbable that I cannot accede to it. On the whole, therefore, though the question is a difficult one, I am of opinion that *Harriet,* the wife of *Thomas Cloak,* is entitled, and that the appeal must be allowed.

Solicitors: *Walter Casper; Farlow & Jackson; G. Beswick; Walker, Son & Field.*

M. W.

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BIRMINGHAM AND DISTRICT LAND COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

[1886 B. 571.]

Practice—Third Party Procedure—Rules of Supreme Court, 1883, *Order* XVI., *r.* 48—*Indemnity.*

A land company had an agreement from *B.* to demise to them certain lands for building purposes, the agreement to be voidable as to all land not actually demised if the buildings were not completed within a certain time. *B.* agreed to sell part of the land to a railway company subject to the building agreement. The time for building having expired without the buildings being erected, the railway company took possession and treated the building agreement as at an end. The land company thereupon brought their action against the railway company, alleging that an agreement had been made between them and *B.* for extension of the time, and that the railway company bought with notice of it, and seeking to restrain the railway company from interfering with the land till they had compensated the land company, pursuant to the *Lands Clauses Act.* The railway company applied for leave to serve *B.* with a third-party notice on the ground that he had sold to them free from all incumbrances, except the building agreement, and without notice of the extension of time, and was bound to indemnify them against any claim the land company could establish:—

Held, by *Chitty,* J., and by the Court of Appeal, that in order to bring a case within Order XVI., r. 48, it is not enough that if the plaintiff succeeds the defendant will have a claim for damages against the third party, but the defendant must have against the third party a direct right to indemnity as such, which right must—generally, if not always—arise from contract

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express or implied, and that here there was no ground for implying such a contract.

The Court afterwards declined to allow the case to be re-argued on the ground that an enactment in the *Conveyancing and Law of Property Act*, 1881, had been overlooked.

THIS action was brought by the *Birmingham and District Land Company* against the *London and North Western Railway Company*, and the case made by the statement of claim was to the following effect: On the 5th of February, 1877, *M. P. W. Boulton*, tenant for life of the *Boulton* estates, acting as "the leasing authority," under the *Boulton Estates Act*, 1874, entered into an agreement with the land company to grant them building leases of about 8½ acres of land, in the neighbourhood of *Birmingham*. The rent for the whole land was to be £471 after the fourth year, less rents being reserved for the preceding years, and there were provisions for granting separate leases as the land company might wish. The land company agreed to erect and complete 120 houses before the 29th of November, 1885, and in default of their doing so the reversioner was empowered to re-enter and determine the agreement as regarded all parts of the land of which leases had not been granted. There was a similar agreement on the 5th of April, 1877, as to another piece of land, the limit of time being the 29th of November, 1881. There was also an agreement, dated the 27th of October, 1879, but stated by the Plaintiff company not to have been executed till November, 1881, which modified the two above agreements as regarded the character of the houses to be erected on different parts of the land. In 1880 a railway was projected which would, if made, interfere with the above lands, but the bill for making it was thrown out in 1881. In 1882 the *London and North Western Railway Company* promoted another scheme for a branch railway, which also would interfere materially with this land, and in 1883 the *London and North Western* (*New Railways*) *Act*, 1883 was passed, authorizing the making the proposed line. The pendency of these schemes made it undesirable for the land company to continue their buildings, as in case of either scheme being authorized by Parliament, a large part of the houses if erected would have to be pulled down, and the rest would be of a character unsuitable to the neighbour-

hood, as altered by the railway company's works. The land company accordingly, pending the application to Parliament by the *London and North Western Railway Company*, applied to Mr. *Boulton* for modifications in the agreements. An arrangement was accordingly made for extending the time, and the land company suspended their building pending the proceedings in Parliament. Mr. *Boulton* and his trustees agreed with the railway company in July, 1883, for the sale to them of certain parts of the lands comprised in the above agreements. The time limited for the erection of the buildings having expired, the railway company treated the agreements with the land company as at an end. The land company thereupon commenced this action. The statement of claim alleged that "upon the treaty for the said purchase, the Defendant company were expressly informed of the existence of the said agreements and of the arrangement for the extension of time, and the alteration of the class of building, and that the Defendant company would have to buy (and they, in fact, bought) subject thereto." On the 18th of September, 1884, the Defendant company gave the Plaintiff company notice to treat for part of the lands comprised in the agreements. The land company claimed a declaration that the agreements of 1877 were subsisting agreements, and that the value of their interest was to be ascertained on that footing, and an injunction to restrain the railway company from interfering with the land till they had compensated the Plaintiff company in pursuance of the *Lands Clauses Act*.

The railway company by their statement of defence denied notice of any agreement except those of the 5th of February, 1877, the 5th of April, 1877, and the 27th of October, 1879, and stated that if the Court should be of opinion that the Plaintiff company could maintain the action against them, they, the Defendant company, "will claim to be indemnified by" Mr. *Boulton* and his trustees against the claim of the Plaintiffs, and would claim to be compensated out of the money payable for the property purchased by them from Mr. *Boulton* and his trustees for any loss they might sustain by reason of the claim of the Plaintiffs.

The Defendant company applied in Chambers for leave to issue a notice under Order XVI., r. 48, and to serve the same with a copy of the statement of claim on Mr. *Boulton* and his trustees.

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By an affidavit filed on behalf of the railway company, it was deposed that by a written agreement dated the 31st of July, 1883, pending their application to Parliament, Mr. *Boulton* and his trustees contracted to sell to the railway company the lands in question and certain other lands in fee simple, free from incumbrances, except and subject to the said agreements of the 5th of February, 1877, the 5th of April, 1877, and the 27th of October, 1879, and subject to all tenant's rights thereunder. The affidavit went on to state that no buildings were erected by the Plaintiff company on any part of the lands comprised in the agreement of the 31st of July, 1883, and that no lease had been granted of any part of them; that the Defendant company, on the treaty for their purchase, were not informed of any agreement for extension of the times limited by the agreements of 1877 for the completion of the building operations, and that they had accordingly treated those agreements as at an end as regarded the land bought by them.

No conveyance had been executed to the railway company by Mr. *Boulton* and his trustees.

The summons was adjourned into Court, and heard by Mr. Justice *Chitty* on the 20th of November, 1886. The Defendants gave notice that on the hearing in Court they would ask in the alternative that Mr. *Boulton* and his trustees might be added as Defendants.

Ince, Q.C., and *O. L. Clare*, in support of the application:—

Our case is that we did not purchase subject to the parol arrangement, and are not bound by it. But if we are bound by that arrangement, then we have a right to be indemnified by our vendors, who sold to us free from incumbrances, except so far as the property was affected by the two agreements of 1877 and the agreement of 1879, against the loss occasioned to us by the extension of those agreements by the alleged parol arrangement, which is, in effect, an incumbrance on the property. On an application such as this, under the Rules of Supreme Court, 1883, Order XVI., r. 48, the Court will not, and ought not to, decide whether the claim for contribution or indemnity is valid, but simply whether it is put forward *bonâ fide*, and is of such a

nature that, if established, it will result in contribution or indemnity. "The only question is whether they claim indemnity within the meaning of the rule": *Carshore* v. *North Eastern Railway Company* (1). We admit that the agreement between the Defendant company and the *Boulton* trustees does not use the word "indemnity;" but so long as that agreement is one that results, or may result, in the *Boulton* trustees having personally to indemnify the Defendant company out of funds in their hands the absence from the contract of the word is not material, and we are entitled to bring in *Boulton's* trustees to get the benefit of that indemnity.

[CHITTY, J.:—Is not indemnity used in the sense of a right to indemnity under express or implied contract? The rule of 1883 was altered by the omission of the words "or other remedy or relief."]

All that is necessary is that we should shew a *bonâ fide*, and not a merely frivolous, claim for indemnity against the third party; some ground for saying that the claim may succeed at the trial: *Jacobs, Hart, & Co.* v. *Brown* (2).

Supposing we do not obtain leave to bring in the *Boulton* trustees, either as third parties or defendants, and the Plaintiffs succeed in establishing in their absence that there was a parol contract, judgment will be given against us with costs. Then, if we bring an action against the *Boulton* trustees for misrepresentation, and to recover against them, by deduction from the purchase-money, what we have been ordered to pay to the Plaintiffs, they may succeed in shewing that there never was any such parol contract. They are, therefore, "parties whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause" within Order XVI., r. 11.

Romer, Q.C., and *Woodroffe*, for the Plaintiff company, *contrà*:—

With respect to adding the vendors to the railway company as parties to the action, why should the Plaintiff company be

(1) 29 Ch. D. 344. (2) W. N. 1884, p. 23.

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compelled to add as defendants persons against whom they have no claim, and between whom and themselves no question whatever arises? Clearly there is no contract for indemnity between the vendors and the Defendant company.

The claim of the Defendants is rested upon damages, or that if specific performance is enforced against them by their vendors it must be with compensation for the defect in title. But it by no means follows that the sum to be recovered by us from the Defendants will be the same or anything like what they might get from their vendors, and that is enough to shew that the case is not within the rule.

[CHITTY, J.:—The distinction between a covenant by a party to do a particular thing and his covenant to indemnify some one else against the consequences of his not doing it is well put by Parke, B., in *Penley* v. *Watts* (1), cited in *Mayne* on Damages (2). In the latter case "the defendants would be responsible, unless they had put themselves into the same condition as the plaintiffs, and saved them from all harm, and amongst other things, from the costs of the action brought against them; and if the plaintiffs had desired to be so secured, they might have made themselves safe by taking a covenant of indemnity against any breach of the covenants in the original lease."]

The rule as altered in the Orders of 1883 is confined to cases of contribution or indemnity in the strict sense: *Pontifex* v. *Foord* (3); *Catton* v. *Bennett* (4); arising out of a contract express or implied: *Speller* v. *Bristol Steam Navigation Company* (5). *Carshore* v. *North Eastern Railway Company* (6) is distinguishable. The decision there was that the claim against the third party, whether well founded or not, was a claim for indemnity which could not be said to be frivolous—"but if it could be shewn that their claim, if substantiated, was not one for indemnity, but for something else, it would have been different" (*per Cotton*, L.J. (7)).

[They were stopped.]

(1) 7 M. & W. 601, 609.
(2) 3rd Ed. p. 82.
(3) 12 Q. B. D. 152.
(4) 26 Ch. D. 161.
(5) 13 Q. B. D. 96.
(6) 29 Ch. D. 344.
(7) 29 Ch. D. 346.

CHITTY, J. :—

The Defendant company claims to be entitled to an indemnity over against third persons not parties to the action, and, so claiming, applies to the Judge in Chambers for leave to issue a notice to the third parties in order to bring them in. Now it is not sufficient for a defendant to say merely that he claims an indemnity over; he must shew a reasonable case on which he may succeed on that claim for indemnity. I quite agree that upon the application for leave to issue the third-party notice the Court is not to go into the claim and decide finally whether it is well founded or not. If it sees, however, that there is a fair ground for putting forward the claim as a claim to indemnity, then it appears to me the Court ought to grant the leave, but not otherwise. The construction which the Defendant company are seeking to put upon this rule would really reduce to silence the condition in the rule (Order XVI., rule 48) that the notice must be issued "by leave of the Court or a Judge." It comes to this, that a defendant would only have to state that he claims indemnity, and then, as a matter practically of right, he would be entitled to issue the notice.

Now, having regard to the authorities which have been cited on this rule, it is plain that the term "indemnity" is used in such a sense that a defendant who applies under the order must shew that he has a claim to indemnity on some contract express or implied, or that he has a right thereto on some equitable principle. It is not sufficient for him to say that he wants to bring in the third party because there is an issue between himself and such third party, analogous to, or the same as, the issue between the plaintiff and the defendant in the action. I take the simple case of there being covenants in an underlease expressed in the same terms as those in a superior lease. The question is whether the covenant to repair has been broken or not. It might have been proper to have provided in this rule that all such questions should be tried in the same action. But those who framed the rule in the first instance found that there were very good reasons to think that the wide terms in which the old rule, Order XVI., rule 17, was expressed—that "where a defendant is, or claims to be, entitled to contribution or indemnity, or any other remedy or

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relief over against any other person, or where from any other cause it appears to the Court or a Judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the Court or a Judge may, on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined"—were such that it would lead to embarrassment of the plaintiff in the litigation, and consequently it has been cut down to its present more moderate dimensions. Is there any ground for saying that in a legal sense the Defendants are entitled to indemnity against the *Boulton* trustees? I am satisfied there is not. They have no contract express or implied for an indemnity, nor have they any equitable right to indemnity. If the Defendants are right in what they say they will be entitled to obtain specific performance of the agreement of the 31st of July, 1883, from the *Boulton* trustees, with compensation for a defect in title. But that is not like it at all. They could not bring in on such a question as that, as part of compensation for the damages which they have suffered, the loss they had sustained in this action by having defended it, and having defended it, I am assuming, unsuccessfully. That would be no part of the compensation. The principle, which it would be hardly necessary to refer to after the authorities on the subject as to the distinction between a covenant to repair and a covenant for indemnity, is stated in *Mayne* on Damages (1) with accuracy. During the argument I have read the passage out and I need not repeat it. I consider that it shews clearly the distinction which does exist between such obligations as are there referred to.

I think there is in this case no ground for saying that the *London and North Western Railway Company* are entitled to indemnity against the *Boulton* trustees; I refuse, therefore, the application, and the costs will be the Plaintiffs' costs in any event.

There is the other point. The *London and North Western Railway Company* also ask me to compel the Plaintiffs to add

(1) 3rd Ed. p. 82.

Boulton's trustees as Defendants. I decline to do so, for the shortest of all reasons, that the Plaintiffs have no demand against them whatever.

F. G. A. W.

The Defendants appealed, and the appeal was heard on the 8th of December, 1886.

Ince, Q.C., and *O. L. Clare*, for the appeal:—

We are proceeding under the Rules of the Supreme Court, 1883, Order XVI., r. 48. We claim indemnity from *Boulton's* trustees, who sold to us what they represented to be an unincumbered estate.

[FRY, L.J.:—If the allegations in the claim are true you have no claim against *Boulton's* trustees. If they are false, what case have the Plaintiffs against you?]

No doubt if the allegations as to notice are true, we have no case against *Boulton's* trustees, but if they are untrue the Plaintiffs may still succeed as against us, for we have no legal estate.

[COTTON, L.J.:—You may have a right to damages against *Boulton's* trustees, but have you any right to indemnity within the meaning of the rule?]

Carshore v. *North Eastern Railway Company* (1) supports the view that we have.

[COTTON, L.J.:—In that case the transferee requested the company to register the transfer, and there would be an implied contract to indemnify them for acting on that request.]

In *Hornby* v. *Cardwell* (2) a sub-lessee who had covenanted to observe the terms of the original lease, was brought in as a third party, and it was held that the case was one of indemnity. In *Pontifex* v. *Foord* (3), where the sub-lessee had not covenanted to observe the covenants in the original lease, but had entered into a covenant to repair in the same terms as that in the original lease, the case was held not to be one of indemnity, but that was on the ground that, as each covenant must be construed with reference to the age and character of the premises when it was

(1) 29 Ch. D. 344. (2) 8 Q. B. D. 329.
(3) 12 Q. B. D. 152.

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entered into, the damages under the two covenants would be different; and this was followed in *Cotton* v. *Bennett* (1). *Speller* v. *Bristol Steam Navigation Company* (2) was in substance the same as *Pontifex* v. *Foord* (3): the contracts were not to do the same thing, so there could not be indemnity. *Finlay* v. *Scott* (4) is very similar to this case.

[COTTON, L.J.:—There the contracts were to do the same thing. Can you say that here?]

There is an implied contract of indemnity, as in *Dugdale* v. *Lovering* (5).

[FRY, L.J.:—That went on a request; where is the request in the present case?]

We parted with our money on the faith of the representation that the property was unincumbered. Where a representation is made on the faith of which the contract is entered into, there is an implied contract to indemnify against the consequences of its proving to be untrue. The observations in *Adamson* v. *Jarvis* (6) are in our favour, and Brett, J., in *Dugdale* v. *Lovering*, treats the case as one of indemnity.

[COTTON, L.J.:—There the plaintiff had done something at the request of the defendant.]

The Plaintiffs cannot deprive us of the land, for we have statutory power to take it: if they succeed, the result is that we have to buy them out, and the only question then will be whether we can recover what we pay them from the *Boulton* trustees, either by retainer out of our purchase-money or personally.

Romer, Q.C., and *Woodroffe*, *contrà*, were not called upon.

COTTON, L.J.:—

In this case the Defendants, the *London and North Western Railway Company*, wish to bring in the *Boulton* trustees, from whom they bought. They seek to do so under Order XVI., r. 48, which provides that "where a defendant claims to be entitled to contribution or indemnity over against any person not a party

(1) 26 Ch. D. 161.
(2) 13 Q. B. D. 96.
(3) 12 Q. B. D. 152.
(4) W. N. 1884, p. 8.
(5) Law Rep. 10 C. P. 196.
(6) 4 Bing. 66, 72.

to the action, he may, by leave of the Court or a Judge," issue a third party notice and serve it on such person. Now, in considering what is the meaning of those words "contribution or indemnity," we must consider what the old rule was. It went much further than the present rule, as it extended to any case "where the defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person." Those words "or other remedy or relief" are omitted, and we must construe simply these words "claim to be entitled to contribution or indemnity." The present clearly is not a case of contribution. The question is whether, within the meaning of this rule, the Defendants claim to be entitled to indemnity over against the *Boulton* trustees. We have not to decide, nor are we called upon to give any opinion on the question, whether the Defendants make any case which may entitle them to damages against the *Boulton* trustees; the question is whether they are entitled to indemnity. In my opinion, the rule must mean where the defendant claims a direct right to indemnity by contract express or implied. There may be an implied contract in two ways; the circumstances may be such that the Court or the Judge can come to the conclusion that in fact there was a contract, though not made in express terms, or they may be such that although the Court does not come to the conclusion that in fact there was a contract, it comes to the conclusion that the position of the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. Thus in the case of trustee and *cestui que trust* there is no express contract of indemnity, but from the position the parties occupy there is an obligation on the *cestui que trust* to indemnify the trustee against liabilities which he has incurred as such. Suppose shares are held in the name of a trustee, the *cestui que trust* will be under an obligation without express contract to indemnify him. I mention this that it may not be supposed by using the words "express or implied contract" I cut down those words to a narrow sense.

In my opinion here we cannot say that there is any express or implied contract of indemnity. There is clearly no express contract. Is there an implied contract? It may be the railway

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company if they fail in this action can establish a claim for damages for breach of contract or for misrepresentation as against the *Boulton* trustees, but that is not indemnity.

Then, is there any other ground of indemnity? Of course, if *A.* requests *B.* to do a thing for him, and *B.* in consequence of his doing that act is subject to some liability or loss, then in consequence of the request to do the act the law implies a contract by *A.* to indemnify *B.* from the consequence of his doing it. In that case there is not an express but an implied contract to indemnify the party for doing what he does at the request of the other. But here I cannot see what request can be said to have been made by the *Boulton* trustees to the *London and North Western Railway Company*, nor how any contract to indemnify can be implied unless in every case of a contract for sale a contract to indemnify is to be implied. That, in my opinion, is not the law.

I will now go through the cases cited. The case of *Speller* v. *Bristol Steam Navigation Company* (1) lays down that there must, in order to bring the matter within this rule, be a contract to indemnify either express or implied, not simply a right to claim damages over. That is in accordance with the view which I have expressed. We were referred to a decision in this Court in *Carshore* v. *North Eastern Railway Company* (2) as supporting the Appellants' case. But there the Court, without giving an opinion whether the claim of the defendant as against the third party was well or ill-founded, considered that there were circumstances in the case which, having regard to the cases cited, made it not unreasonable that the defendant should raise the contention that he was entitled to indemnity. There had been a forged transfer of shares and the transferee had taken the transfer to the company, and requested them to register it. The act in respect of which the company were liable to damages to the true owner, namely, the registering the transfer, had, therefore, been done by them at the request of the person who claimed under the forged transfer. Those were facts which raised a not unreasonable case of claim to a right of indemnity as against the person who made that request. This explains that case.

Then we had very much pressed upon us the case of *Adamson*

(1) 13 Q. B. D. 96. (2) 29 Ch. D. 344.

v. *Jarvis* (1), where an auctioneer had been requested by the defendant to sell some cattle, and the auctioneer acting on that request had been held liable in damages. That was a case of indemnity on the ground of request, and it is so put by the Chief Justice, who says (2): "Here is a contract. The plaintiff is hired by defendant to sell, which implies a warranty to indemnify against all the consequences that follow the sale."

The expressions of the present Master of the Rolls in *Dugdale* v. *Lovering* (3) were much relied upon by the Appellants, but that case turned upon a request which is wanting here.

Then there was the case of *Hornby* v. *Cardwell* (4), where there were a lessee and an under-lessee, and the under-lessee had covenanted with his lessor by an instrument referring to the original lease to do things which by the original lease his lessor was bound to do. That was considered, and as I think rightly considered, a covenant of indemnity, because it was a covenant to do for his lessor that which his lessor was, as appeared on the contract, bound to do for somebody else.

Finlay v. *Scott*, before Mr. Justice *Pearson*, was referred to. It is only reported in the *Weekly Notes* (5), and although the judgment is given at some length we cannot rely upon the facts being given as fully as they would have been if the case had been reported in the ordinary way. But I must say that unless there was imported into the contract between the person who was brought in and the defendants, the contract which the defendants had bound themselves by agreement with the plaintiffs to perform, I cannot see how it could be said that there was a contract of indemnity as between the defendants and the person who entered into the second contract with them in order to enable the original contract to be performed. In my opinion here it cannot be said that there is any contract, express or implied, of indemnity. In some respects it might be convenient to bring in the *Boulton* trustees, but we cannot under this rule authorize them to be served.

In my opinion the appeal fails.

(1) 4 Bing. 66.
(2) Ibid. 73.
(3) Law Rep. 10 C. P. 196.
(4) 8 Q. B. D. 329.
(5) W. N. 1884, p. 8.

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BOWEN, L.J.:—

I am of the same opinion. Under the old rules as they stood before the recent alteration the defendant had a power much wider than under the present rule to bring in third persons against whom he might claim some relief or remedy over. The present rule was intended to cut down the old rule. All that we have to consider is whether under the present rule the defendant is a person who can say he is entitled to contribution or indemnity. He plainly is not entitled to contribution. The only question, therefore, is whether he is entitled to indemnity? What is the meaning of the expression "entitled to indemnity"? The Defendants here have no right to anything at all against the *Boulton* trustees, be it observed, except what arises out of their contract of sale. I think it tolerably clear that the rule, when it deals with claims to indemnity, means claims to indemnity as such either at law or in equity. In nine cases out of ten a right to indemnity, if it exists at all as such, must be created either by express contract or by implied contract: by express contract if it is given in terms by the contract between the two parties; by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many cases in which a remedy is given upon an assumed promise by a person to do what, under the circumstances, he ought to do. I say in nine cases out of ten, for there may possibly be a tenth. Thus there might be a statute enacting that under certain circumstances a person should be entitled to indemnity as such, in which case the right would not arise out of contract, and I do not say that there may not be other cases of a direct right in equity to an indemnity as such which does not come within the rule that all indemnity must arise out of contract express or implied. But it is quite clear to my mind that a right to damages, which is all that the Defendants have here if they are entitled to anything, is not a right to indemnity as such. It is the converse of such a right. A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in conse-

quence of the breach of the original contract between the parties. It is an incident which the law attaches to the breach of a contract, and is not a provision of the contract itself. It is suggested here by Mr. *Ince* that this comes within the class of cases where the law implies a contract to indemnify from a request. There is a large class of cases, chiefly arising under the law of principal and agent, where one man employs another to do a thing which the employer apparently has a legal right to direct to be done. The law implies from the request an undertaking on the part of the principal to indemnify the agent if he acts upon the request. It is true that this is not confined only to the case of principal and agent, there are other cases which it is not necessary to examine now. But they all proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so. To attempt to apply such a doctrine in the present instance would be to apply it to a subject-matter with which it has no concern at all. It is idle to say that in a contract for purchase and sale of land there is any request made by one person to the other, or that any legal obligation or rights under such a contract depend on any such idea. Their rights arise out of the direct contract itself. With regard to the cases, *Carshore* v. *North Eastern Railway Company* (1) is a case in which the Court thought that if the defendants' claim was good at all it would be a right to indemnity arising out of an implied contract, there having been a request by the third party. *Speller* v. *Bristol Steam Navigation Company* (2) may not be conclusively in point one way or the other, but I think the law as laid down there is practically the same as we are laying down to-day. As regards the other cases, I need not do more than express my general concurrence with the observations made upon them by Lord Justice *Cotton*.

FRY, L.J.:—

I am entirely of the same mind. The question which we have now to determine is, whether the Appellants have shewn us that they have a *primâ facie* right of indemnity as against the *Boulton*

(1) 29 Ch. D. 344. (2) 13 Q. B. D. 96.

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trustees. It appears to me that they have shewn no such *primâ facie* right. I quite agree that the inquiry is not as if it were at the trial of the cause, and that it is quite competent to the Court, and probably the duty of the Court, to allow a third person to be brought in where a *primâ facie* case has been made out for bringing him in.

Now in my view the word "indemnity" in the rule which we have now to construe, means to express a direct right either at law or in equity to indemnity as such, and I think that this right has to be contrasted, and not to be for a moment confounded, with the right to damages which arises either from a breach of contract or from tort. Let me take in the first instance the case of a breach of contract. A breach of contract gives rise, or may give rise, to a right to damages, but those damages are not the subject of the contract. They arise from the breach of the contract, and therefore they are in no sense the subject of the contract itself. When a man contracts that he will do a thing, it can hardly be taken as implying a contract as to what will arise if he does not do the thing. In the same manner with regard to tort, the right to damages for tort does not arise from any implied contract that if I do a wrong I will indemnify the person wronged for the wrong I have done. It is the common law right which everybody has to damages for a wrong which has been done to him. Therefore the right to such damages is not a right to indemnity, although when you come to ascertain what the measure of damages is, it may be that indemnity will properly express that measure of damages.

That being so, it appears to me sufficient to inquire what is the right of the present Applicants? It is merely the right which arises out of the contract of sale entered into between the *Boulton* trustees and the railway company. If the railway company have any right against those trustees or the tenant for life, whichever it may be, it is simply for breach of contract. That is not a covenant for indemnity in any proper sense of the term.

It is not in my view necessary to inquire whether the direct right to indemnity to which I have referred, and which appears to me to be the only right which is within the scope of this rule, does or does not in all cases arise upon a contract express or

implied. It may well be that there are cases in which there is such a direct right by statute or by some principle of law, and not arising from contract. I do not know that there is, but if there be such a right, I am far from saying that is not an indemnity within the terms of the rule. But to bring a case within the rule, there must be in my judgment a direct right to indemnity as such, to be enforced either at law or in equity.

We have been pressed with the view that there is an implied contract in this case. The cases of principal and agent, the cases of acts done on request, the cases of identical contracts where the second contract is entered into with a knowledge of the first, and other cases have been referred to; but there is none of them which in any way applies to the present case. Therefore it is enough for me to say that in my judgment there is no contract shewn in the present instance, except the express contract between the *Boulton* trustees and the railway company. There is no collateral and implied contract in that, and the only right which the company can have against the *Boulton* trustees will be for a breach of an express contract.

Therefore this appeal fails.

Dec. 20. *Ince*, Q.C., and *O. L. Clare*, applied to have the case reargued on the ground that the *Conveyancing and Law of Property Act*, 1881, s. 7, sub-s. 1 (A) and 2 had been overlooked, which clauses they contended expressly gave an indemnity.

Romer, Q.C., and *Woodroffe*, *contrà*:—

It would be a bad precedent to allow a case to be reargued after judgment because counsel have overlooked a point. It is not as if there was a clear statutory enactment which gave an indisputable right to indemnity. We say that as there has been no conveyance, the *Conveyancing Act* does not apply at all.

COTTON, L.J.:—

We cannot accede to this application. There is a great difference between an application to rehear an interlocutory order, and an application to rehear one which decides the rights of the parties. Our decision in this case affects nothing but the mode

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of procedure. In one sense our order is final, the *Boulton* trustees cannot be brought in unless the House of Lords should reverse our decision, but it does not affect the rights of the parties. I think it would be wrong to allow a mere point of practice to be reargued, because the able counsel retained for the Appellants has had his attention called to an enactment which will furnish him with a further argument. It is not as if the enactment were so clearly in point that there could be no argument on the question, it merely furnishes an argument in addition to those which have been so ably but unsuccessfully addressed to us.

BOWEN, L.J.:—

I am of the same opinion.

FRY, L.J.:—

I entirely agree.

Solicitors for Plaintiffs: *Robinson, Preston & Stow*, agents for *Rowlands & Co., Birmingham.*

Solicitor for Defendants: *C. H. Mason.*

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[1886 D. 1110.]

Principal and Agent—Production of Documents to Persons appointed by Principal—Practice—Striking out Pleadings—Groundless Defence—Rules of Supreme Court, 1883, *Order* XXV., *r.* 4.

A firm of merchants residing abroad brought an action against their agent in this country, claiming production of the documents relating to their business to a person appointed by them for that purpose. The Defendant put in a defence stating that the person appointed by the Plaintiffs was a clerk in a rival and unfriendly house of business, for which reason he objected to produce the documents to him, but that he was willing to produce them to any proper person. The Plaintiffs moved, under Order XXV., r. 4, to strike out the defence:—

Held (affirming the decision of *Chitty*, J.), that although a principal had a general right to the production of documents in the hands of his agent

to any person appointed by him, he cannot insist on their being produced to an improper person; and therefore the defence disclosed a reasonable answer to the claim.

Whether an action for the sole purpose of enforcing the production of documents to a particular person will lie, *quære*.

THE action in this case was brought by a firm of merchants carrying on business in *New South Wales* against their agent in this country, claiming that the Defendant might be ordered to produce for the inspection and examination by the Plaintiffs' agent or agents at all reasonable times certain invoices, books, and documents relating to the goods purchased on behalf of or shipped to the Plaintiffs, and generally to the transactions of the Defendant as agent for the Plaintiffs.

In the 4th paragraph of the statement of claim, the Plaintiffs stated that in order to ascertain whether the Defendant's accounts were correct, it was necessary that the Plaintiffs' agent in this country should inspect the original invoices, receipts, and other documents, and that the Plaintiffs had by their agent, on and since the 10th of May last, made applications to the Defendant for such inspection, but neither the Plaintiffs nor their agent had received any reply to such applications.

The Defendant put in a statement of defence in which he did not deny that he was the Plaintiffs' agent, but did not admit that the terms of his employment were correctly stated in the statement of claim. In the 3rd paragraph of the defence he said: "The Plaintiffs' agent referred to in the 4th paragraph of the statement of claim as having applied to the Defendant for inspection of the documents in the same paragraph mentioned is Mr. *M. S. B. Pritchard.* The said Mr. *Pritchard* is clerk to Mr. *L. A. Tallerman,* who was formerly partner with the Defendant, and is now on unfriendly terms and engaged in litigation with the Defendant, and is carrying on a business similar to that carried on by the Defendant, and is the Defendant's rival and competitor in business. For the reasons aforesaid the Defendant is unwilling that his books should be inspected by the said Mr. *Pritchard.* The facts above stated with respect to the said Mr. *Pritchard* and Mr. *Tallerman* were well known to the Plaintiffs when they appointed the said Mr. *Pritchard* their agent to

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inspect the documents aforesaid." The Defendant stated, however, that he had always been willing to permit the inspection of the documents by any proper person appointed by the Plaintiffs.

The Plaintiffs moved before Mr. Justice *Chitty* on the 10th of December, 1886, under Order xxv., rule 4, to strike out the defence as disclosing no reasonable answer to the Plaintiffs' claim, and that judgment might be given for the Plaintiffs. His Lordship refused the application, and the Plaintiffs appealed.

Romer, Q.C., and *Grosvenor Woods*, for the Appellants:—

The motion is made under Order xxv., rule 4, which gives power to the Court to order any pleading to be struck out on the ground that it discloses "no reasonable cause of action or answer," and in such a case to order the action to be stayed or dismissed, or judgment to be entered accordingly as may be just. We contend that the statement of defence discloses no reasonable answer to the action. The Defendant, as our agent, is bound to produce the books and invoices to any person whom we may appoint, and cannot object to anyone as improper. Where a principal is abroad it would be impossible to carry on business through an agent on any other terms. The books really belong to us, and the information contained in them is our information. Mr. *Pritchard* is our general agent in *England*, and is the proper person to inspect the books: *Brown* v. *Perkins* (1); *Draper* v. *Manchester, Sheffield, and Lincolnshire Railway Compaay* (2). The Defendant's refusal to admit the terms of the agency is no answer to our claim, as he does not deny the fact of the agency: *Thorp* v. *Holdsworth* (3). The defence is frivolous, and this is the proper mode of getting rid of it now that demurrers are abolished; and the question is to be decided as if upon demurrer: *Metropolitan Bank* v. *Pooley* (4); *Burstall* v. *Beyfus* (5); *Parsons* v. *Burton* (before Mr. Justice *Field* in Chambers, 6th of December, 1883). If the Plaintiffs have a right to object to an improper person, the defence shews no reasonable ground for objecting to Mr. *Pritchard*.

(1) 2 Hare, 540.
(2) 3 D. F. & J. 23.
(3) 3 Ch. D. 637.
(4) 10 App. Cas. 210.
(5) 26 Ch. D. 35.

Macnaghten, Q.C., and *D. L. Alexander*, for the Defendant, were not called upon.

COTTON, L.J.:—

This is a somewhat singular action. It is not an action brought for an account, and the present application is not to obtain production of documents for the purposes of such an action, but it is an action brought by a principal against his agent simply to compel the production of the accounts kept by the agent for the principal, not to the principal, but to the particular agent whom the principal has appointed for the purpose of considering those accounts.

The case now comes before us under Order XXV., rule 4. One question which was raised was this, whether we are to deal with the matter as we should if it were on demurrer. Now, in my opinion, Order XXV., rules 2, 3, and 4, take the place of proceedings on a demurrer in this sense, that they enable the Court where it sees there is no reasonable ground of action, or no defence to an action, to deal with the matter as it would have done on demurrer, that is to say, either to put an end to the action, or to put an end to the defence. But then the Court is not bound in the same way as it was on demurrer to look to the statements in the pleadings as they stand. It must see whether there is, or is not, any reasonable ground of action, or whether there is any reasonable answer to the action which has been commenced. Therefore, in my opinion, we are not to look upon it with the same strictness that we should, if there was a demurrer to this statement of defence; but we must see whether that statement of defence gives a reasonable ground of objection to the order or judgment for which the Plaintiffs ask.

Now, what are the facts? The Plaintiffs are abroad, and of course it was the duty of the Defendant, as agent, to produce to the principals any accounts that were kept for them; and where the principal is abroad, in my opinion the agent is bound to produce to any properly appointed agent of the principal any books of account kept for the principal. Here we have not to consider the question whether such an action, singular as it is, can be maintained, because the objection is not taken by the Defendant

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that the statement of claim shews no ground for any judgment against him. But in my opinion the right of the principal is confined to this, that there must be a production to an agent proper for the purpose; and in an action like this, simply for the purpose of producing to a particular person, we ought to be stricter than we are when we consider whether in an action brought for some other purpose beyond the mere production of documents, inspection ought to be allowed to a particular agent; because in such a case, if the particular agent appointed to inspect attempted to use the knowledge he obtained by that inspection for any purpose other than the purposes of the action, he would be guilty of contempt, and on proper application the Court would punish him. But, in the present case, it is said that the information claimed is the information of the principals, and when the agent gets it, the Court has no control whatever over the use which the agent, as representing the principals, may make of it. Probably in the action, the Court would have no power to commit the agent if he used it improperly, and it is impossible to say he has only the use of it for the purposes of the action, because the action has no purpose except the mere production of the documents.

Now we come to the point—is there any reasonable ground of objection given to Mr. *Pritchard*, the principals' agent, for the inspection? What was asked for is this. Mr. *Grosvenor Woods* said, "All I ask for is a judgment for production to the Plaintiffs or their agents." In my opinion where it appears that the only object of the action is to produce to a particular agent, it would be wrong to make any such order, and if that order were to establish that the principal can ask for or get an order for production, not for the purposes of the suit, but for his own purposes, to any agent however objectionable he may be, I think it would be wrong to make any such order; and as the action really is to enforce production to Mr. *Pritchard*, we ought to consider whether there is any reasonable ground of objection shewn to Mr. *Pritchard*. I do not say that we are to be confined to the exact statements which are contained in the statement of defence, but, looking at those statements, is not there a reasonable ground for the refusal of production to Mr. *Pritchard?* Will not that be the probable result when we come to take the evidence in this case? I think

it will be. I think that on the pleadings here we are not to take it that Mr. *Pritchard* has been appointed general agent of the Plaintiffs. He is the clerk of a trader who is the rival of, and not on good terms with, the Defendant. In my opinion it is a very probable result indeed, that production to that particular agent would be injurious to the Defendant, and might be used to his prejudice. Therefore in my opinion it would be wrong, without hearing what is to be said in the evidence, without letting the case go for trial, to cut the matter short and say, this defence shews no reasonable objection to what the Plaintiffs ask for, and it must be struck out; or that, on these pleadings, the Court ought at once, *brevi manu*, to make an order giving the Plaintiffs the relief they ask, either for production to themselves, or to this particular agent, Mr. *Pritchard*.

It was said that he was to be treated as the general agent, and that no objection could be taken to him, and for that proposition reliance was placed on the case of *Brown* v. *Perkins* (1). That very much illustrates the difficulty there is in a proceeding like this. It is very true that there the defendant said it would be injurious to him and his clients if production were ordered to the solicitor of the plaintiff, who was a rival solicitor in the town in which he also resided. The Court said that the plaintiff had the right, but suggested that there should be production to some other solicitor, who was not a rival of the defendant. But there the person to whom production was to be made was the agent of the plaintiff in the suit, and, of course, when obtaining production for the purposes of the suit, he was the proper person to whom production should be made. I do not mean to say there may not be cases where production to the plaintiff's solicitor in an action might not be refused. I do not bind myself to say that might not be the case. In that particular case the plaintiff had honestly selected a particular solicitor, not selecting a solicitor in order to injure or with a view of being able to injure the defendant, and there was a hold over him (which I have before mentioned) if he used the information got for the purposes of the action for any other purpose. Therefore that case does not apply to or govern the present, where, what the Plaintiffs are asking

(1) 2 Hare, 540.

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for is production to an agent against whom the Defendant shews what may be a reasonable ground of objection, the production being not for the purposes of the action, but for any purpose. In my opinion, therefore, the appeal fails.

LINDLEY, L.J.:—

I am of the same opinion. The application to strike out this statement of defence under Order XXV., rule 4, appears to me to be one which ought not to succeed. Order XXV. abolishes in form the old demurrer. The rules 2, 3 and 4 give an alternative method of proceeding, so that persons may not be deprived of those advantages, when they were advantages, of demurring, and having their claim decided upon demurrer without going into facts when it was unnecessary so to do. There is always a method of bringing a point of law before the Court for argument before trial, if, in the opinion of the Court, it is desirable to do so. That method is pointed out in Order XXV., rule 2, and very often in the construction of an agreement or of a will there is a short point which the Court will order to be argued in the way mentioned in that rule, which gives to suitors precisely the same advantages as they had before in demurrers. Then we also know there were a great many disadvantages attending demurrers. A demurrer was very often made simply an occasion for an argument by which the parties on each side profited merely by amending their pleadings, and no result came of it but costs. A great many forms in the Orders are so short that if they were looked at through the old spectacles they would be demurrable. Rule 4 goes a little further, and allows a Court or a Judge not only to do what may be done under rule 2, namely, to direct a point of law to be argued, but to strike out a statement of claim or defence, not upon the ground that it discloses no cause of action or no defence, but upon the ground that it discloses no reasonable cause of action or defence, which is another thing altogether. Of course any pleading which discloses no reasonable ground of action or defence is demurrable at once, and it is something more, it is perfectly frivolous. Now that is the sort of thing that is struck at by rule 4. It appears to me that this defence, whether good or bad, cannot be regarded as frivolous, or vexatious, or unreasonable.

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The action is a curious one, and at first I did not understand it. The action is an action brought for an account, by a principal against his agent. That is right enough. In such an action the Plaintiffs would get the common order to inspect. That is obvious: but that is precisely what the Plaintiffs do not want. They do not want the common order to inspect, but want to vindicate their right to have inspection by a special person whom the Defendant does not like, and therefore they change their action in the statement of claim. They abandon their claim for an account and say they do not want it, but they do want what they cannot get in the other form of action, inspection by that particular person to whom the Defendant objects.

The whole controversy, now we get at it, is whether the Plaintiffs are or are not entitled to have an order for inspection of their agent's accounts by Mr. *Pritchard*, supposing the Defendant objects to him. This is the whole point. The counsel for the Appellants contend that a principal, or if not a principal, at all events a foreign principal, has a right to appoint anybody to inspect the books of his agent whether his agent reasonably objects to the person so appointed or not. That startled me at first, and counsel candidly admitted they could find no authority for their contention. The Court cannot say, and ought not to say, that a defence raising that point is so unreasonable that it ought to be struck out, that there is nothing in it, and that the Court *brevi manu* ought to make an order deciding that there should be an inspection of this objectionable nature.

Now what are the grounds of objection? It is said they are sentimental and frivolous, or at all events that they are not reasonable. The ground of objection as disclosed by the pleadings is this, that the person appointed by the Plaintiffs to inspect the Defendant's books is the clerk of a rival trader. There are no affidavits, but that is the substance of it. The Defendant says, "I object to that man, I do not object to shew my books to any proper person, but I object to that man on that ground." If this case ever goes to trial, which I hope it will not, we shall have all sorts of evidence upon that. But can the Court say it is unreasonable, and that it is a mere sentiment? It appears to me to be a most reasonable thing for any business man to

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say, such and such a person is a rival of mine, and his clerk is not a proper man to come and overhaul my books containing these entries. I do not think that that objection is got rid of by saying that the knowledge of the agent is the knowledge of the principal, and that the principal is entitled to the knowledge possessed by the agent. No doubt the principal is entitled to come and see the books if he likes, and he is entitled to have a copy of them sent by the agent at the principal's expense. There is no controversy about that, and I am not at all prepared to deny his right to have the books inspected by a person whom the Court thinks is a proper person in case of dispute on that point. But I deny altogether the principle which has been so stoutly contended for, that the principal has a right to say he can appoint whom he likes, whether he makes a reasonable appointment or not. I am not prepared to admit that. It appears to me both in substance and form that this application fails and that the appeal should be dismissed.

LOPES, L.J.:—

I am of the same opinion, and I entirely agree in the judgments which have been delivered. I only desire to say this, that it is to be observed that this is not an action for an account, it is an action brought by foreign principals to obtain production and inspection of documents by a particular agent named by the Plaintiffs. I myself entertain considerable doubt whether such an action will lie at all. It is not necessary to express a decided opinion upon the matter as the question does not arise here, but I desire to guard myself by saying so much.

Solicitor for Plaintiffs: *Harvey-Samuel.*
Solicitor for Defendant; *H. Montagu.*

M. W.

BANNATYNE *v.* DIRECT SPANISH TELEGRAPH COMPANY.

C. A. 1886 V.-C. B. *Oct.* 29; C. A. *Nov.* 10, 22, 23.

[1886 B. 4875.]

Company—Reduction of Capital—Preference Shares—Companies Act, 1867 (30 & 31 *Vict. c.* 131) [*Revised Ed. Statutes, vol. xv., p.* 623]—40 & 41 *Vict. c.* 26 [*Revised Ed. Statutes, vol. xviii., p.* 367.]

The articles of a submarine telegraph company, limited by shares, and formed in 1872, with a capital of £130,000 in £10 shares, gave power to increase the capital by the issue of new shares, with power to give preferential rights to any shares so created. It was provided that such new capital should be considered part of the original capital, and should be subject to the same provisions, except so far as the resolutions authorizing the raising of it might otherwise direct. The articles also empowered the company by special resolution to reduce its capital, and alter the amount and denomination of its shares. In 1874 a special resolution was passed for raising £60,000 by the issue of 6000 shares of £10 each, which were to be paid up in full on allotment, and to be entitled to a fixed preferential dividend of £10 per cent. These shares were all taken and paid up. In 1884 one of the submarine cables of the company broke down, and was lost, diminishing the assets by about one half. The company passed a special resolution for reducing the capital to one half by reducing to one half the nominal amount of each share, ordinary or preferential. A preferential shareholder brought an action on behalf of himself and the other preferential shareholders to restrain the company from acting on that resolution and from applying to the Court to sanction it.

Bacon, V.C., granted an injunction, being of opinion that what was proposed to be done was a breach of the company's contract with the preferential shareholders:—

Held, on appeal, that the preference shareholders took their shares subject to the provisions of the articles, which contained a power to the company to reduce its capital and alter the amount and denomination of its shares; that there was no bargain with the preference shareholders that they should receive £6000 a year on the whole of their shares, the resolution being satisfied by their receiving £10 per cent. on the nominal amount of their shares, and that what was proposed to be done was no breach of the contract with them.

Per Cotton, L.J.:—If what it was proposed to do had been a breach of the contract with the preference shareholders, the preference shareholders would have had a right to prevent the company from exercising, in a manner inconsistent with the contract, the powers for reduction of capital given by 30 & 31 Vict. c. 131, and 40 & 41 Vict. c. 26.

Per Cotton, L.J.:—*Semble*, on an application to sanction a reduction of

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capital the Judge, though satisfied that the rights of creditors are not interfered with by the reduction, is not bound to sanction it if he sees that it would work unfairly as against any shareholders who do not consent to it.

THIS company was registered on the 8th of November, 1872, as a company limited by shares. Its object was to establish and work telegraphic communication between *Spain* and *England*. The nominal capital was £130,000 in £10 shares. The 7th, 9th, and 10th of the articles of association were as follows:—

"7. The directors may, with the previous sanction of a special resolution of the company, increase its capital by the issue of new shares to such an aggregate amount, with such preferential right to dividend, and such priority in the distribution of assets, or subject to such postponement of dividends, or in the distribution of assets, as shall in such special resolution be provided, or, if no provision shall be thereby given, as the directors think expedient; and such increase of capital may be made, although the whole of the existing capital may not have been allotted."

"9. All capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions in all respects as if it had been part of the original capital, except so far as these articles or the resolutions authorizing the raising thereof may otherwise direct."

"10. The company may also, by special resolution, from time to time reduce its capital, and also alter the amount and denomination of its shares."

Nearly the whole of the 13,000 shares were issued, and £9 per share was paid up before the issue of preference shares. By the articles the dividends on shares were to be in proportion to the amounts paid up.

On the 3rd of July,1874, the following special resolutions were passed, which were duly confirmed at a meeting held on the 17th.

"1. That the directors be and they are hereby authorized to purchase for this company the submarine cable laid between *Barcelona* and *Marseilles*."

"2. That, for effecting this purchase, and for other purposes of the company, the directors be and they are hereby authorized

to increase the capital of the company by the issue of 6000 new shares of £10 each, to be paid in full on allotment."

"3. That such new shares shall be entitled to a fixed preferential dividend of £10 per cent. per annum, and that if in any year the net profits of the company shall not be sufficient to pay the whole of such preferential dividend for that year, the balance shall be paid (but without interest) out of the profits of the next year, and, if need be, of succeeding years."

The new shares were all issued and paid up.

The certificates were in the following form:—

"This is to certify that ———, of ———, is the proprietor of ——— fully paid-up £10 per cent. preference shares, Nos. ———, ———, ———, in the *Direct Spanish Telegraph Company, Limited*, subject to the rules and regulations of the company, and to the conditions indorsed hereon."

The indorsement was: "The shares will be entitled to a fixed dividend of £10 per cent. per annum, and if in any year the net profits of the company shall not be sufficient to pay the whole of such preferential dividend for that year, the balance will be paid (but without interest) out of the profits of the next year, and, if need be, of succeeding years."

The company began with one cable between *Cornwall* and *Bilbao*, which they purchased for £112,000. In 1882 this cable began to shew signs of failure, and in 1884 it broke down. The company had in the meantime laid down a new cable between those places, the money for which was raised by the issue of debentures, and it was considered unadvisable to attempt to restore the original cable.

The break down of the cable causing a loss of a considerable part of the assets, the company were advised that they could not properly pay any dividend until they had accumulated money enough to restore the cable, or had reduced their capital so as to make their nominal capital correspond with their assets. The directors recommended the latter course, and at a special meeting of the company held on the 30th of September, 1886, the following resolutions were passed:—

"That in consequence of the abandonment of the company's

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original cable, the capital of the company be reduced from £190,000 (at present represented by 6000 preference shares of £10 each, all issued and fully paid-up, and 13,000 ordinary shares of £10 each, whereof 12,931 are issued, and have £9 per share paid-up, and sixty-nine are unissued), to £95,000, and that such reduction be effected by writing off £5 per share from the amount credited as paid up on each issued share, and £5 per share from the nominal amount of each unissued share, the amount so written off the issued shares being capital not represented by available assets. That the directors may make such regulations as they think fit for exchanging the certificates of shares for certificates in conformity with the foregoing resolution."

This resolution was confirmed at a meeting on the 19th of October, 1886.

The Plaintiff, who was a preference shareholder, then brought this action on behalf of himself and all the preference shareholders, except such of them as were Defendants, against the company and the directors for a declaration that the special resolutions for reducing the capital were *ultrà vires* and void, and for an injunction to restrain the Defendants from acting on them, and from making any application to the Court to confirm the reduction of capital.

The Plaintiff moved before Vice-Chancellor *Bacon* for an injunction on the 29th of October, 1886.

Marten, Q.C., and *H. B. Howard*, for the Plaintiff, contended that the company had no power to alter their contract with the preference shareholders as evidenced by the resolution and the preference share certificates. They cited *Blisset* v. *Daniel* (1) and *Allhusen* v. *Borries* (2).

Rigby, Q.C., and *W. P. Beale*, for the Defendant company, contended that the preference shareholders must bear their share of any loss of capital; that there was no such contract as that the shareholders should, whatever the vicissitudes of the company might be, have a permanent charge of £6000 a year: and that the preference shareholders took their shares subject to the power

(1) 10 Hare, 493, 522. (2) 15 W. R. 739.

expressly given by the articles to the directors with the sanction of the company to reduce the "capital," which included both the ordinary and preference share capital.

Burton Buckley, for the Defendants, Sir *James Anderson* and the other directors, took the same view, and urged that to adopt the Plaintiff's argument would be to hold that the directors had precluded themselves from ever reducing the capital at all, notwithstanding the express power to do so given by the articles.

Marten, in reply.

BACON, V.C.:—

I think this is the first time that this question has been presented to the Court. Among the multitudinous cases before the Court as to companies, I am not aware of any case at all like this. However, the case, in its elements, is as simple as one can desire. A company is formed in the usual way. The articles of association give powers which are very commonly given to companies, that is to say, powers to increase, diminish, or alter the capital. The 7th clause, which relates to capital, authorizes the directors to increase the capital of the company in the manner there mentioned, and the 10th clause enables the company by special resolution to reduce its capital, and to alter the amount and denomination of its shares; but that is as between the company and the outside world. The company have power to constitute themselves in their own way, to settle their shares in their own way. What has all that to do with the contract between the company and its shareholders? The long and ingenious arguments that I have heard upon the subject appear to me not to be at all applicable to the case before me. It is not the power contained in the Act of Parliament relating to the reduction of capital, nor that in the articles of association to which I have been referred, which at all affects this case in my opinion. The company borrow these moneys from the preferential shareholders at 10 per cent. upon the terms contained in a resolution a copy of which is endorsed on each share certificate. That is a plain contract entered into by the company with the holders

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of those shares, that they shall be entitled to a fixed preferential dividend of 10 per cent. per annum, and that, if in any year the profits are insufficient, the balance shall be paid out of the profits of the next year, and, if not, in the succeeding years. There can be no doubt whatever about the contract made between the directors of the company, representing the company, and these creditors—the lenders of the money taking these £10 shares—that the interest is to be paid in the manner stated in the indorsement on the certificate. The Act of Parliament authorizes a company to reduce its capital. Well and good. There may be many reasons why it may be desirable for a company to reduce its capital. All that it is lawful for the company to do; but the Act says that care is to be taken to see that the creditors will not be injured by the reduction. Mr. *Buckley* has endeavoured to shew, in his very able argument, that in this case the creditors will not be interfered with by what is proposed to be done—that the company are to gain no additional powers; that all they are empowered to do is to be done *inter se* by their own arrangements alone; and that after all the conditions which the statute requires, and which the law requires, are performed, all that remains to be done is for the company to settle between themselves what they choose to do with their own shares. But where is there any instance or an inkling of any power on the part of a company who have issued shares called preference shares, and have contracted to pay out of their profits, if they make any, a certain dividend to the holders of those shares, to depart at their own will, with the vote of the majority or not, from the contract they have entered into? I have not heard a suggestion or a possibility of a suggestion to that effect. The argument was that if there was a winding-up then the whole thing would go by the board. Well and good. If the directors desire to exercise their powers strictly, and to borrow more money, they may borrow from persons who may be prevailed upon to lend it, and may give them a preference over the present holders of the preference shares. It is quite true that that may not be so here, but then, of course, that is an incident to the carrying on of the business of the concern. The directors are authorized to borrow money, and if they borrow money the means of carrying on the business are increased.

They borrow on highly advantageous terms of people who are willing to lend them further moneys, and they give them a preference as to dividend. The power of raising new capital is for the benefit of the preference shareholders, and is a means of carrying on the business. It takes nothing away from them; it adds nothing to the loss they might otherwise sustain; it might protect them from loss, for possibly it might prevent a winding-up of the concern. The question is whether directors of companies, who have contracted to pay out of their profits a dividend to the preference shareholders at a certain fixed rate, can by any contrivance, prudent or imprudent, honest or fraudulent, of their own free will say:—"Now we will entirely neutralise that provision. We will prevent the persons to whom we have promised the 10 per cent. from receiving it; and, more than that, out of those profits with which we were to have paid the preference shareholders their 10 per cent., we will pay a dividend to the ordinary shareholders, although they have no right to receive a shilling until the 10 per cent. is paid." That would be the result of what is asked and what is intended to be done by this company. Nothing can be further from my purpose than to suggest that there is any dishonest intention on the part of the directors of this company; but I am obliged to consider that there are a great many companies whose directors are not as respectable as they are here, and whose motives and objects are not as pure as those of this company; and if I were to countenance that which this perfectly honest, but, as I think, mistaken company, proposes to do, I should be opening the door to the contrivances which the purlieus of the *Stock Exchange* are somewhat cognizant of, and should be enabling persons to form fictitious companies. They might hold out a prospect to the preference shareholders, and then as soon as they had got the money by means of the preference shares, they might resort to some expedient to cancel or reduce the amount of the capital, and so let in the ordinary shareholders, and let them take for all time, through good years and bad years, so long as the concern lasted, the same share of profits as the preference shareholders would have been entitled to. It would be frightful if I should enable them to do that. I cannot go into motives, and I do not. I

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impute no improper motives in this case; but in another case I could not go into the motives if I found that the thing could be done formally, as it has been done here. I do not impute to this company anything but honest intentions, but I conceive the consequence of allowing them to persist in what they have proposed to do would be to raise the ordinary shares from shares worth, perhaps, a farthing apiece to shares which would get as good a dividend as the preference shares. It would be a wholesale recipe and a mode of cheating preference shareholders for the benefit of ordinary shareholders whatever the relative amount or value of the shares might be. The contract formed by the issue of the share certificates under the resolution authorizing the issue of the preference shares was literally within the terms of the articles of association; the amount of the new capital was mentioned there, the shares were mentioned there, and the contract was fully evidenced there. That contract would be put an end to by what is proposed to be done. Some other mode may possibly be devised for reducing the capital; but the company have no right to do it in the manner now proposed. A preferential dividend of 10 per cent. was secured by their resolution, and by the certificate which was issued in consequence of the resolution. If I allowed what is now proposed to be done it would be giving wholesale authority to fraudulent persons to deprive at will those whose legal rights are plain and fixed upon contract. In my opinion the Plaintiff is entitled to an injunction according to the terms of the notice of motion, until trial or further order. I make no order as to costs.

G. I. F. C.

C. A.

The company appealed, and the appeal was argued on the 10th and 22nd of November, 1886.

Rigby, Q.C., and *W. P. Beale*, for the Appellants:—

The power to reduce the nominal capital when assets have been lost is now clear. The late Master of the Rolls, in *In re Ebbw Vale Steel, Iron, and Coal Company* (1), held that the *Companies Act*, 1867 (30 & 31 Vict. c. 131), did not authorize the reduction of

(1) 4 Ch. D. 827.

the nominal capital below the amount which had been paid up, but the Act 40 & 41 Vict. c. 26, made it clear that paid-up capital might be reduced. Preference shareholders are *quasi* partners, and we say that they take their share of the loss of capital along with the others.

[COTTON, L.J., suggested that the point might rather be one for the discretion of the Judge as to sanctioning the scheme than a ground for an injunction.]

We do not dispute that if the company bargained with the preference shareholders in a way which excludes the company from making this application an injunction will lie; but we say that the bargain was not of that nature. Under art. 7 the company might by special resolution create pre-preference shares, which would have priority over the present preference shares. There was no bargain with them that they should at all times and under all circumstances have £6000 a year. So long as the capital stood as it was they had a right to a preferential dividend of £10 per cent. on their shares. Art. 9 provides that capital raised by the creation of new shares shall be considered as part of the original capital, and be subject to the same provisions in all respects. The special resolutions creating the preference shares gave the preference shareholders a better position as to dividend than the others, but in all other respects the preference shares constituted part of the original capital, and were liable to all its incidents, one of which was that the capital might be reduced. Clause 10 provided that the company might by special resolution from time to time reduce its capital and alter the amount and denomination of its shares. Taking these two articles together, they may be read, "The company may reduce its capital, including any capital that may be created with a preferential dividend, and may alter the amount and denomination of the shares." This, of course, could only be done in accordance with the provisions of the Acts, and in the present case an event has happened which according to the Acts authorizes a reduction of capital, viz., the loss of a large part of the assets. The Plaintiff is seeking to introduce into the bargain with the preference shareholders a term which is not there, and

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which in fact is excluded by the terms of the articles. The bargain was that they were to have £10 per cent. on their capital, but in all other respects they were on the same footing with other shareholders. They took their shares subject to the provisions of the articles, which included a power of reducing capital. Art. 10 applies to all the capital, not merely to the original capital, and a resolution for reducing one part of it only, excluding the preferential shares, would be *ultrà vires*. It is contended by the Plaintiff that this is a plan for taking money away from the preference shareholders to give it to the ordinary shareholders, but that is not so; it is a *bonâ fide* honest plan, approved by nearly all the preference shareholders, for doing what is considered most advantageous to all the shareholders. If the capital is not reduced the profits will have to be impounded for years to replace the lost capital. The Judge has a wide discretionary power of imposing terms on sanctioning a reduction, so he can guard against any injustice; and unless the Court finds a clear bargain that the power of reducing the capital shall not be exercised against the will of any preference shareholder, it has no jurisdiction to restrain an application to sanction the reduction.

Buckley, Q.C., for the directors.

Marten, Q.C., and *H. B. Howard*, for the Plaintiff:—

This is an attempt by the ordinary shareholders to deprive the preference shareholders of the benefit of the bargain made with them when they took their shares. According to their bargain, when the assets have been replaced they will begin again to receive their £10 per cent. dividend, and the arrears will have to be made up out of the profits of subsequent years.

[COTTON, L.J.:—I am disposed to think that you might have a contract which would enable the Court to interfere by injunction; but have you such a contract?]

We submit that the third resolution of 1874 and the certificates amount to one. To construe them as the Defendants do puts the preference shareholders at the mercy of the ordinary shareholders. It is urged that the 10th article overrides everything, but the existence of that article does not shew that the company

may act under it in defiance of any bargain they have entered into. The bargain was for £10 per cent. on the £10 per share which was paid. In 1874, when these shares were issued, paid-up capital was not reducible, and regard must be had to that in construing the terms of the bargain.

[FRY, L.J.:—In *In re Crédit Foncier of England* (1), in 1871, a scheme for reduction of paid-up capital was sanctioned by the Court. The *Ebbw Vale Case* (2) was decided in 1877, and followed in *In re Kirkstall Brewery Company* (3). In 1874 the understanding was that paid-up capital might be reduced.

COTTON, L.J.:—Do you contend that the existence of shares with a preferential dividend prevents any reduction of capital?]

No; we have no objection to the reduction of capital provided that, so long as the company is a going concern, we receive the dividend we bargained for. We do not contend that we have any priority as to capital if the company is wound up. The cases on partnership do not furnish much guidance on such a point as this, but the cases of *Blisset* v. *Daniel* (4) and *Allhusen* v. *Borries* (5) furnish some analogy. As regards the point which has been taken, that this is not a case for injunction, but one where the point may be dealt with on the application to the Court to sanction the reduction, the Act of 1867 contains no provision as to the appearance of shareholders, nor does the Act of 1877. If, then, we were to appear, we might be told that we had no *locus standi*, and in fact we should have no notice. The application would come on as an unopposed petition.

Rigby, in reply:—

The Act of 1877 does not affirm the *Ebbw Vale Case*. The recital is only that doubts had arisen. It is not therefore to be taken as law that at the time when these preference shares were issued paid-up capital was not liable to reduction, and, as Lord Justice *Fry* has pointed out, the understanding was the other way. If the existence of preference shareholders is to prevent

(1) Law Rep. 11 Eq. 356.
(2) 4 Ch. D. 827.
(3) 5 Ch. D. 535.
(4) 10 Hare, 493.
(5) 15 W. R. 739.

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reduction of capital, then a company which found that it had more capital than it could profitably employ would be prevented from returning any part of it to the ordinary shareholders. If the bargain with preference shareholders was that a given amount of dividend should go on, then a reduction of capital will not prejudice them.

1886. Nov. 23. COTTON, L.J.:—

This is an appeal from Vice-Chancellor *Bacon*, which raises a very important question. The Defendant company was formed in the year 1872, and it had a capital of £130,000 with power to add to that capital by issue of new shares, and with power to give preference to any shares that might thus be created. In 1874 resolutions were passed to increase the capital by 6000 new shares of £10 each, and those shares were to have a preference as regards dividend, but no preference as regards capital. The company lost one of their cables, thus losing a considerable part of their capital. Resolutions were passed that they should reduce their capital by striking off half the nominal amount of each of the shares, both ordinary shares and preference shares. An injunction to restrain the company and its directors from acting on these resolutions and applying to the Court to sanction the reduction was granted by Vice-Chancellor *Bacon* at the suit of one of the shareholders who held preference shares as well as ordinary shares, and this is an appeal by the company against that injunction. The most important clauses in the articles of association are arts. 7, 9 and 10, which are these: Art. 7. "The directors may, with the previous sanction of a special resolution of the company, increase its capital by the issue of new shares to such an aggregate amount, with such preferential right to dividend and such priority in the distribution of assets, or subject to such postponement of dividends, or in the distribution of assets, as shall in such special resolution be provided." Art. 9. "All capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions in all respects as if it had been part of the original capital, except so far as these articles or the resolution authorizing the raising thereof may otherwise direct." Art. 10. "The

company may also, by special resolution, from time to time, reduce its capital and also alter the amount and denomination of its shares."

The *Companies Act*, 1867, was then in operation, and art. 10 must be considered with reference to that Act; of course, had it not been for that Act the reduction could not have been effectually made, but we have in the articles a provision that the capital might be reduced, a provision to which under the provisions of that Act effect could be given. In my opinion that is important to be considered in dealing with the question what was the bargain under which the preference shareholders took their shares. I need not read the resolution for diminishing their capital; that was passed on the 30th of September, 1886. After the Act of 1877 came into operation there is no doubt that a reduction of paid-up capital is sanctioned by Parliament, but of course, we cannot look to the Act of 1877 alone for the purpose of considering what the bargain was under which the preference shareholders came in.

The Act of 1867 gives in general terms power to reduce the capital. Preference capital was a thing then well known and very usual in companies formed under the Act of 1862, as well as in companies formed under the *Companies Clauses Act*. On what ground is it contended that the action of the directors and company under that Act, and also now under the Act of 1877, is *ultrà vires*, or ought to be restrained? As regards its being beyond their power, I, myself, do not entertain any doubt that under those Acts it is authorized; but the question still remains as to whether it is contrary to the bargain made by the directors and the company with those who took preference shares, and we must consider that question. It was contended at first that the existence of these preference shares shewed a contract that there should be no reduction of capital. That was partly abandoned, but still we must deal with the question. In my opinion that contention cannot prevail. The Act of 1867 gives in general terms power to reduce capital, and the articles of association in this case provide that the preference shares when formed shall be part of the capital. If there was a winding-up, the capital being partly lost, the preference shareholders and the ordinary

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shareholders must bear the loss rateably between them, because these shares were constituted without any preference as regards capital, though they had a preference as regards dividend. Then, if that is so, and there is a loss of capital, in consequence of which there is a reduction made in the capital of the company by reducing the nominal amount of the shares, that must be borne not only by the ordinary shareholders but also by the preference shareholders, and ultimately it was hardly contended that there could be no reduction of capital, in consequence of the existence of preference shareholders having a preference in dividend only, and not a preference as regards capital. But it was urged that the contract in this case would be broken unless the preference shareholders still had the same amount of dividend as they now have. It was put in this way: It was said in substance "These 6000 shares are all issued and are fully paid up and are constituted with a preferential dividend of 10 per cent. That is equal to £1 per share, and we must look at the matter as if there had been a contract to give the holders perpetually, as long as profits could be obtained to provide it, an annuity of £6000 a year, and, although you may reduce the capital, yet you must not cut off any portion of that annuity. You may reduce the capital, if you in your resolution to reduce the capital provide that that annuity of £6000 a year shall still be paid to the preference shareholders, though their shares are reduced from £10 shares to £5 shares." Let us see what the bargain was. I may say, for my own part, that if there was a bargain which would be broken by the reduction of capital, I think that the Plaintiff and the other preference shareholders would have a case, not to destroy the powers of the Act of Parliament, but to prevent those who had contracted with them from applying the powers of the Act in a manner inconsistent with their contract, for they are powers given to, and not duties imposed on, the company or its directors. Here, what is the contract and how would it be broken by what is proposed to be done? The directors are authorized to purchase for the company a new submarine cable, and it is resolved, (2.) "That for effecting this purpose and for other purposes of the company, the directors be and they are hereby authorized to increase the capital of the company by the

issue of 6000 new shares of £10 each to be paid in full on allotment; (3.) That such new shares shall be entitled to a fixed preferential dividend of 10 per cent. per annum," and then there is the right, if the profits in any year shall not be sufficient, to have recourse indefinitely to the profits of succeeding years. It was practically not contended, and in my opinion it could not be successfully contended, that the second resolution, providing that there shall be an issue of new shares of £10 each, contained any contract which would be broken by applying under the Act to reduce the shares, ordinary and preferential, from £10 shares to £5 shares. Is there any contract in the third resolution as to dividend which prevents this being done, so as to reduce the dividend which will be paid to the preference shareholders to 10 per cent. on what will then be the amount of their shares? "Such new shares shall be entitled to a fixed preferential dividend of 10 per cent. per annum." It is very true that 10 per cent. on what was actually paid on the shares was £1 per share, but in my opinion the bargain was not for £1 per share, so as to make an annuity of £6000 in respect of the whole of the preference shares, but for £10 per cent. on the amount of the shares, and if by any means the amount of the shares is reduced from £10 to £5—which will be the result if these resolutions for the reduction of capital are carried into effect—then the bargain, in my opinion, will be performed by giving the holders of those preference shares 10 per cent. on the then amount of their capital in the company. We must take into consideration this—that at the time when this bargain was made there was this special provision in the articles, that the company might from time to time reduce its capital and also alter the amount and denomination of its shares. No doubt what has happened was not contemplated, but still those who made a bargain where the articles had that provision ought to know and take into consideration that, although they took the shares of £10 with a contract that there should be a dividend of 10 per cent., which so long as the shares were £10 would give them the £1 a share, there was in the clause in the articles a contemplation of its being necessary to reduce the capital. In my opinion they ought also to be considered as knowing and taking into consideration the provisions of the Act of 1867, which provided that

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a company limited by shares might by special resolution so far modify the conditions contained in their memorandum of association, if authorized so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital. That is in general terms, which would apply not only to original non-preferential capital, but to any preferential capital; but, as regards the bargain here, art. 10 makes it clear to my mind that the power to reduce was intended by the articles to apply to any preferential shares which might be created, especially having regard to the previous article, which said that they were to be considered as part of the original capital.

It was contended that although there is now an Act of 1877, which renders it possible effectually to do that which the resolution proposes to do, the Act which was in force at the time when this bargain was made, the Act of 1867, had been decided not to enable this to be done, and that for that reason the Act of 1877 was passed. But at the time when this bargain was made by the issue of the new shares there was a decision that a reduction of paid-up capital could be made under the Act of 1867, and although the late Master of the Rolls, in the case of the *Ebbw Vale Steel, Iron, and Coal Company*, in January, 1877 (1), decided that it could not be done, yet the Act of 1877 did not recognise that as law, but merely, in order to remove doubts and difficulties, provided that "capital" as used in the Act of 1867 shall include paid-up capital. I am by no means prepared to say that I think the view of the late Master of the Rolls, expressed in 1877, was the correct view. I should think that the Act of 1867 was quite wide enough of itself to enable what has now been done to be done; but however that may be, we must, as regards the understanding of the parties, suppose them to have looked to *In re Crédit Foncier of England* (2); and the doubt caused by the decision in *In re Ebbw Vale Steel, Iron, and Coal Company* in 1877 cannot affect the construction of the contract entered into in 1874. In my opinion there is no breach of that contract by what the directors propose to do, by diminishing the capital and allowing the dividend to still remain 10 per cent. on the then reduced amount of the shares.

I have entered into the case fully for the purpose of dealing

(1) 4 Ch. D. 827. (2) Law Rep. 11 Eq. 356.

with the questions which are in contest between the parties, and if we cannot hold that the mere reduction of capital and an application to one of the Judges of the Chancery Division to sanction it would be a breach of contract, we cannot interfere. If the directors were bringing forward this scheme not honestly for the purpose of reducing capital, but for some other indirect purpose, the Plaintiff might have a case, but no such case is raised, and if it were raised I am not clear that it would be a ground for an injunction. The Judge when he has to consider, under the provisions of the Acts of 1867 and 1877, whether he shall make an order sanctioning it, is only required by the Act of 1867 to be satisfied that the creditors are duly protected, yet when he is satisfied of that, it is not obligatory on him to authorize the scheme which is proposed. The words are:—"He may make an order, confirming the reduction on such terms, and subject to such conditions as he deems fit." That leaves a discretion in him, and in my opinion, although it is not necessary to decide that point, I think that the Judge, when the matter is brought before him, if he sees it bears hardly on those who do not consent, may take that into consideration, and ought not to sanction a scheme simply because the creditors, who must be looked to, are dealt with properly, and have no ground of complaint. I thought it right to express my opinion on that point, as the matter has come before us, and we have had the questions argued. In my opinion this action fails, and the injunction ought to be discharged, and as the parties have agreed to treat this as the trial, the action will be dismissed with costs.

FRY, L.J.:—

In the year 1867 there was passed a statute which provided that "any company limited by shares" might by special resolution so far modify the conditions of its memorandum of association as to reduce its capital. The words of that section are general, and refer to any company limited by shares. It appears to me that, bearing in mind the fact that at the time that Act was passed the existence of preference capital was common and well-known, and that the Legislature must be taken to have had full knowledge of that fact, it is impossible to contend that a company

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limited by shares does not include a company some of whose capital is preferential capital. Now, that being the enactment of 1867, the course of practice under it enabled companies to reduce capital, although paid up. Such an order was made by the Vice-Chancellor *Malins* in the case of *In re Muntz Metal Company* in July, 1870 (1), and a similar order was made by Vice-Chancellor *Bacon* in the matter of the *Crédit Foncier of England* (2), in January, 1871. As far as our attention has been drawn to the authorities, and as far as they are known to us—at any rate known to me—no doubt was until January, 1877, cast on the power of the Court to sanction the reduction of capital, although paid up. That being the state of the law as declared by Act of Parliament and by the authorities, this company was registered in 1872. By the articles of association the company was authorized to increase its capital by the issue of new shares and to give a preferential right to these shares if it thought fit. It was declared that the new capital so raised should be considered as part of the original capital, and there was further an express power given to reduce the capital of the company. Now, upon these articles of association, it appears to me to be plain that the intention was to authorize the creation and the reduction of preferential capital. We next come to the special resolutions passed in July, 1874, when the state of the law and practice under the Act of 1867 remained as I have already stated. By the resolutions then passed preferential capital was created; each share consisting of £10 was to be paid up fully on allotment, and the third resolution provided that the new shares should be entitled to a fixed preferential dividend of 10 per cent. per annum. The question which has been argued before us is this, whether or no those special resolutions create a contract which excludes this company from the right of applying to reduce its preferential paid-up capital. Now, having regard to the state of the law, and having, especially, regard to the articles of association with which these special resolutions must be read, it appears to me to be reasonably plain that the intention of the parties was that the preferential capital so to be created would fall under the operation of the 10th article, and be capable of reduction. It seems to me to be

(1) 18 W. R. 1064. (2) Law Rep. 11 Eq. 356.

reasonably plain that if it had been the intention of the contracting parties to exclude that, the resolutions would have been framed very differently from what they are. They would have been in such undoubted terms as to exclude that power. The language appears to me entirely opposed to any such contention as that which was addressed to us by the Respondents. The right is a right to a fixed preferential dividend of 10 per cent. per annum. But on what? Obviously, it seems to me, on the amount of the shares, those shares being, as I have already stated, according to my view of the true construction of the instruments, subject to the power of reduction. The contention of Mr. *Marten* was, it seems to me, a rather extraordinary one. He did not deny the right of the company to reduce the preferential capital, but he maintained if the preferential capital were reduced the rate of preferential dividend must be proportionately increased, so that the amount should be constant. That would violate the very words of the resolution, which fixes the preferential dividend not at a given sum, but at a certain percentage on some other sum which is not expressed in the resolution. That is an entirely untenable contention. I think, therefore the true view of the bargain between the parties was this, that the preferential capital was created subject to the right of reduction which was expressly provided for in the articles of association. There are no words, no indication whatever of intention in those resolutions to exclude the power so expressly given to the company. It appears to me not necessary to say any more on that. That determines adversely to the Plaintiff one of the propositions which it is necessary for him to establish.

Various other questions have been referred to, and more or less discussed, during the argument. I am far from expressing any difference of opinion from the view which Lord Justice *Cotton* has enunciated, but I do not express my opinion on the question how far it is possible by contract to exclude the right of applying to the Court under the Acts of 1867 and 1877, or how far the jurisdiction of the Court and the exercise of the jurisdiction under those sections is discretionary, or how far it is proper for the Court to consider the contract between the preference and other

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shareholders in determining whether it shall or shall not approve of the reduction. I do not express any opinion on those points, because they have not been fully argued, and although I express no dissent from what has been said by Lord Justice *Cotton*, I think it safer for myself to consider that they are still open questions. I agree in the conclusion that this action must be dismissed with costs.

Solicitors for Plaintiff: *Murray, Hutchins, & Co.*
Solicitors for Defendants: *Blunt & Lawford.*

H. C. J.

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1886

Dec. 11, 16.

Limited Company—Reduction of Capital—Ordinary and Preference Shareholders—Confirming Resolution—Petition—Discretionary Power of Court—Companies Act, 1867, *s.* 11 [*Revised Ed. Statutes, vol. xv., p.* 625]—*Companies Act*, 1877.

The power given to the Court by sect. 11 of the *Companies Act*, 1867, to confirm a resolution to reduce capital is a discretionary power—that is to say, the Court may exercise it either by confirming with or without conditions, or by declining to confirm on a full consideration of all the circumstances. One matter to be taken into account, is whether the proposed scheme would work injustice between the different classes of shareholders: if, in the opinion of the Court, such would be its effect, it is not the function of the Court to impose conditions amounting to an alteration of the scheme; but the proper course to take, if such an alteration is requisite, is simply to refuse to confirm the resolution, leaving it to the company to prepare a new scheme if they should think fit.

The capital of a company consisted of ordinary shares of £10 each, part issued with £9 per share paid up and the remainder unissued, and of preference shares of £10 each all fully paid up, bearing a fixed preferential dividend of 10 per cent. per annum, the deficiency in any year to be made up out of the profits of the next or subsequent years. No dividend had been paid on the ordinary shares, and there were some preference dividends in arrear, they having been retained towards replacing the company's reserve fund which had become exhausted. The company having lost part of its assets, passed a special resolution for reducing its capital by a corresponding amount. This they did by writing off £5 per share from the amount paid up on each issued share and £5 per share from the nominal amount of each unissued share; the effect of which, it appeared, would be to place the company at once in a dividend-paying condition, and set free for the preference shareholders the preference dividends which had been retained. The resolution was passed by large majorities of both classes of shareholders.

Upon a petition presented by the company under the *Companies Acts*, 1867 and 1877, the Court confirmed the resolution for reduction.

PETITION.

The *Direct Spanish Telegraph Company, Limited*, was incorporated in 1872, under the *Companies Act*, 1862, for the purpose of purchasing, maintaining and working submarine telegraph cables between *England* and *Spain*. The original capital of the company was £130,000 in 13,000 shares of £10 each, of which 12,931 shares were issued with £9 per share paid up, the remainder being unissued.

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Shortly after their incorporation the company purchased a submarine cable laid between the *Lizard*, on the coast of *Cornwall*, and *Bilbao*, in *Spain*, for £112,000, and thereupon commenced business.

By the articles of association the directors were authorized, with the sanction of a special resolution of the company, to increase the capital by the issue of new shares with a preferential right of dividend; all capital raised by the creation of new shares to be considered as part of the original capital, and to be subject to the same provisions in all respects as if it had been part of the original capital. It was also provided that the company might, "by special resolution from time to time reduce its capital and also alter the amount and denomination of its shares."

In 1874 the company purchased a submarine cable laid between *Barcelona* and *Marseilles* for £45,000, and for the purpose of effecting the purchase and for other purposes, the capital was increased by £60,000 under the authority of special resolutions duly passed. These resolutions empowered the directors to issue 6000 new shares of £10 each, to be paid in full on allotment, and to be entitled to a fixed preferential dividend of 10 per cent. per annum, with a provision that if in any year the net profits of the company should not be sufficient to pay the whole of the preferential dividend for that year, the balance should be paid out of the profits of the next or subsequent years. Accordingly, in 1874, the company issued 6000 preference shares of £10 each, all of which were fully paid up.

In the early part of 1886 it was ascertained that the original cable of the company between the *Lizard* and *Bilbao* was so defective that it was necessary to abandon it, and consequently the present assets of the company had become insufficient to represent the issued capital by a deficiency of £95,000. Thereupon, by a special resolution of the company duly passed and confirmed in accordance with sect. 51 of the *Companies Act*, 1862, at extraordinary general meetings held on the 30th of September and the 19th of October, 1886, it was resolved that in consequence of the abandonment of the company's original cable, the whole capital, both original and preference, amounting to £190,000, should be reduced to £95,000, by writing off £5 per share from the amount

paid up on each issued share, and £5 per share from the nominal amount of each unissued share, the amount so written off the issued shares being capital not represented by available assets. This special resolution was duly registered with the Registrar of Joint Stock Companies on the 28th of October, 1886, and the minute proposed to be delivered to the Registrar pursuant to sect. 15 of the *Companies Act*, 1867, and sect. 4 of the *Companies Act*, 1877, was in the following form:—

"The capital of the company is £95,000 on, as reduced, 19,000 shares of £5 each. Of the said shares, 6000 are preference shares bearing a 10 per cent. preferential dividend and all issued and fully paid up, 12,931 are ordinary shares issued and having £4 per share paid up, and the remaining 69 are ordinary shares remaining unissued."

On the 29th of October, 1886, upon a motion by the Plaintiff in an action of *Bannatyne* v. *Direct Spanish Telegraph Company*, brought by a preference shareholder on behalf of himself and other holders of preference shares, Vice-Chancellor *Bacon* granted an interim injunction restraining the company from acting on the special resolution for reduction of capital and from presenting a petition to confirm the reduction. On appeal that injunction was ordered to be discharged, and as the decision of the Court of Appeal disposed of the main question in the action, a judgment was taken dismissing the action with costs (1).

The company then presented this petition under the *Companies Acts*, 1867 and 1877, asking that the special resolution for reduction of capital might be confirmed by the order of the Court; that the use of the words "and reduced" might be dispensed with; and that the minute above stated might be approved.

From the evidence adduced in support of the petition it appeared that the expenditure by the company upon the repairs of their lost cable had by the end of the year 1884 practically exhausted their reserve fund, and the directors were advised by counsel that this fund should be replaced and kept up before further dividends were declared: that up to the end of 1884 the dividends on the preference capital had been regularly paid,

(1) *Ante*, p. 287.

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though not on the ordinary capital, but that for the half-year ending the 31st of December, 1884, no dividend was paid upon the preference shares, the whole balance of profits, with a trifling exception, being carried to the reserve fund, and that the same course had been pursued in the subsequent half-years down to the present time: that the effect of the proposed reduction would be to place the company in a sound and dividend-paying condition at once, and also set free for distribution to the preference shareholders the accumulated dividends at present in hand and unpaid: that the whole question of the reduction was thoroughly discussed at the meetings at which the resolution was passed, and that the resolution was passed by very large majorities of each class of shareholders, both ordinary and preference. It also appeared that, upon it becoming known in the market that the company were taking steps to reduce their capital in the manner proposed, the preference shares at once improved in value and that sales were effected at such improved value.

The petition was not served upon any one.

Rigby, Q.C., and *W. P. Beale*, for the petition:—

This petition is presented under sect. 11 of the *Companies Act*, 1867, which says that, on the hearing of such a petition, the Court "may make an order confirming the reduction on such terms and subject to such conditions as it deems fit," the creditors, if any, being protected by sect. 4 of the Act of 1877. The power of the Court is limited to making an order confirming or not confirming the reduction; that is to say, to directing that the resolution shall or shall not be carried into effect. The Court cannot alter the terms of the resolution by proposing another mode of reduction, though it may impose terms as a condition for confirming the reduction; for instance, it may require the use of the words "and reduced" to be continued, or that notice should be given to creditors whose attention has not been fully called to the scheme, or otherwise.

[KAY, J.:—In exercising its power of confirming a resolution to reduce capital the Court has to consider what is just and equitable as between the different classes of shareholders, and not merely to confirm the resolution.]

We admit the reduction must be proportionate as between the different classes of capital: you cannot reduce part only: there must be a reduction all round, and, in reducing, the relative positions of the various classes of shareholders must be preserved. No doubt, where part of the entire capital has been paid up and part not, a general reduction all round might work hardship to the holders of fully paid-up shares: but, after all, it is a question of bargain. In the present case an all-round reduction is proposed, and has been approved of by majorities of both classes of shareholders, so that there is no question of one class taking advantage of their position to benefit themselves by overriding another class. The evidence moreover shews that the proposed mode of reduction will improve the position of both classes of shareholders.

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The Court is asked to confirm a resolution for reduction of the capital of this company. The case is one in which creditors are not affected, because no capital is to be returned, nor is the liability of the shareholders to be diminished; but the company, having sustained serious losses by the destruction of one of their submarine telegraph cables, desire to write off a portion of the paid-up capital on which they pay dividends, and thus to enable them to release part of a reserve fund which they have been forming and which they now propose to apply in payment of the arrears due on the preference shares. The shares are, preference shares of £10 each fully paid up, and ordinary shares of the same nominal amount, on which only £9 has been paid. Dividends are paid not on the nominal amount, but upon the amount paid up on each. In the articles is a provision that the company should have power by special resolution to reduce their capital and alter the amount and denomination of their shares.

The preference shareholders having taken shares subject to this provision, it has been held, in a litigation commenced by some of them to restrain the present proceeding for reduction, that it would not be contrary to the contract with them to do so —that they cannot maintain that there was an absolute bargain to divide among them an annuity equal to the total amount of the

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dividends on their paid-up capital; but that the contract was to pay to each £10 per cent. on such capital, subject to the liability that the capital might be reduced by proper proceedings for that purpose under the terms of the articles.

The power given to the Court by sect. 11 of the *Companies Act*, 1867, to confirm a resolution to reduce capital is a discretionary power—that is to say, the Court may exercise it either by confirming with or without conditions, or by declining to confirm on a full consideration of all the circumstances. One matter to be taken into account is whether the proposed scheme would work injustice between the different classes of the shareholders. I agree that if the Court should think that would be the effect it would not be the function of the Court to impose conditions which would amount to an alteration of the scheme; but the proper course to take, if such an alteration should be requisite, would be simply to refuse to confirm the resolution, leaving it to the company to prepare a new scheme if they thought fit.

Several cases of hardship and inequality as between shareholders were suggested. Suppose there were preference shareholders of £5 shares and ordinary shareholders of £10 all paid-up, and the proposal were to write £5 off each share, that would totally extinguish the preference shares for the benefit of the ordinary shareholders. If all the shares were £10 shares, but the preference were £5 paid and the ordinary £10 paid, writing off £5 in that case would have the same effect until the rest of the capital was called up on the preference shares. Again, if the proposal were to return capital to the shareholders, cases might arise involving questions as to whether the return should be in proportion to the nominal amount or to the amount actually paid on each share. A return of capital in the winding-up of a company may perhaps be hardly analogous, because then the liability for further calls is taken away by dissolving the company.

But, upon consideration, I do not think that the proposed reduction in this case will be unjust as between the shareholders. It is intended to write off £5 per share of the amount actually paid, both on the preference and ordinary shares. As dividends are paid only on the amount paid up per share, this will reduce the dividend payable to the preference shareholders by a less

proportional amount than that payable to the ordinary shareholders; that is to say, supposing the profits to be sufficient to pay 10 per cent. on all the capital paid up, the preference shareholder would be entitled to receive £1 per share, and the ordinary shareholder only 18*s.* By the reduction the preference shareholder would be deprived of 10*s.*, leaving him 10*s.*, dividend per share, and the ordinary shareholder of 10*s.*, leaving him 8*s.* But unless an equal dividend had been paid on the preference and ordinary shares, which, I understand, has not been done in this case, the reduction may increase the chance of the ordinary shareholders receiving a dividend, or increase the amount per share which they may receive. The preference shareholders no doubt are induced to consent by the payment which is to be made of the arrears of their dividends. But this also will be an advantage to the ordinary shareholders, because in this company I understand they are not entitled to anything until the arrears on the preference shares have been provided for.

The publicity which has been given to the matter by the litigation to which I have referred renders it unnecessary to continue the words "and reduced" as part of the name of the company. There must be the usual advertisements in the *The Gazette* and in *The Times* newspaper; and subject to this the Court confirms the resolution and approves the minute.

Solicitors: *Blunt & Lawford.*

G. I. F. C.

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Dec. 13, 14, 15.

STEWART *v.* WEST DERBY BURIAL BOARD.

[1885 S. 1277.]

Burial—Separation of Parishes—Vicar—District Parish—Rector—Burial Fees—Ancient Churchyard—Burial Ground—Cemetery—Burial Board—"Incumbent or Minister"—Jurisdiction—Burials Acts, 1852 *and* 1853 (15 *&* 16 *Vict. c.* 85), *ss.* 32, 52 [*Revised Ed. Statutes, vol. xi., pp.* 506, 512]; 16 *&* 17 *Vict. c.* 134 [*Revised Ed. Statutes, vol. xi. p.* 966]—*Walton-on-the-Hill Rectory Act*, 1843 (6 *&* 7 *Vict.*)

Where a cemetery is formed by a burial board under the *Burials Acts*, 1852 and 1853, for a parish which never had any burial-ground, the incumbent of the parish is bound to perform the services in the consecrated part of the cemetery over bodies of parishioners and inhabitants of his parish, and is entitled to take any ecclesiastical fees which the board may collect in respect of such services.

Hornby v. *Toxteth Park Burial Board* (1) discussed.

The parish of *Walton*, which included the township of *West Derby*, had an ancient churchyard, fees being, by custom, payable to the vicar (as distinguished from the rector) for burials therein.

By the *Walton Rectory Act*, 1843, the township of *West Derby* was made a separate parish. It comprised three chapels of ease with consecrated cemeteries attached which, prior to the separation, had been provided for the parish of *Walton*, and the sentences of consecration of which reserved double fees for burials to the vicar of *Walton* and the curates of the chapels. No districts were attached to any of these chapels. The parish of *West Derby* never had any separate burial-ground of its own, but in 1884 a burial-ground was provided in that parish by a burial board under the *Burials Act*, 1852 (15 & 16 Vict. c. 85), extended by 16 & 17 Vict. c. 134, a portion of it being duly consecrated.

An action having been brought by the rector of *West Derby* against the board claiming the right to bury and receive fees for burials in such burial-ground,

The Court being of opinion that it had jurisdiction to entertain the action, as the question involved one of property, namely, the right to fees:—

Held, reading sects. 32 and 52 of the *Burials Act*, 1852, together, that, in the consecrated portion of such burial-ground, the Plaintiff, as rector of *West Derby*, was under an absolute obligation, by himself or by his curate, or such duly qualified person as he might authorize, to perform the same duties in respect of burial in such burial-ground of parishioners or inhabitants of *West Derby* as he would have been obliged to perform if it had been the burial-ground of his parish, and was entitled to the rights and authorities incident to such duties; and was also entitled to receive all such fees as the burial board might collect or receive in respect of such duties.

IN former times the parish or rectory and the vicarage of *Walton-on-the-Hill*, in the county of *Lancaster*, which now forms

(1) 31 Beav. 52.

part of a populous district in the suburbs of *Liverpool*, extended over various townships, including the township of *West Derby*, the rectory and the vicarage being vested in different persons, both spiritual. Attached to the parish church of *Walton-on-the-Hill* was an ancient churchyard, fees being, by custom, payable to the vicar in respect of burials in the churchyard, and fees and other dues being also, by custom, payable to him for the erection of monuments, gravestones, tablets, or monumental inscriptions in the churchyard.

In the year 1813 one *Edward Mason* purchased a piece of ground at *Edgehill*, in the parish of *Walton-on-the-Hill*, upon part of which he, at his own expense, erected or caused to be erected a chapel of ease, afterwards known as *St. Mary's, Edgehill*, the remainder, comprising about 1000 square yards, being set apart as a graveyard or cemetery attached to the chapel. The chapel and cemetery were duly consecrated by the bishop of the diocese.

The "sentence of consecration" of the chapel and cemetery of *St. Mary's, Edgehill* was dated the 25th of September, 1813. It recited the conveyance by *Mason* to trustees of a piece of ground at *Edgehill* in trust, as to part, as a site for the erection of a chapel, and as to the remainder as a cemetery or place of Christian burial, and upon trust to obtain consecration of such chapel and cemetery according to the rites and usage of the United Church of *England* and *Ireland*; that the trustees had erected the chapel and enclosed the cemetery, and had, together with *Mason*, "solemnly renounced and receded from all right, title, and interest which they had theretofore in the said chapel, and in the ground enclosed about for a chapel yard, and had voluntarily surrendered and given up the same unto" the bishop of the diocese for the uses thereinafter mentioned. The bishop, then, thereby separated the chapel from common and profane uses and dedicated it to the worship of God and the celebration of divine offices only; and granted to the clerks who should be licensed to officiate in the chapel authority "to celebrate divine service therein, that is, to read the public prayers, sincerely and faithfully expound the Holy Scriptures and preach the word of God, to administer the holy sacraments, church women, bury the dead in the yard thereof, and do and

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perform other divine offices which usually are and may be lawfully done and performed in other churches or chapels according to the rites and usage of the United Church of *England* and *Ireland*, as well to the inhabitants of *Edgehill* aforesaid, and places adjacent, as to all others desirous of resorting thereto to hear the said public offices read and performed and divine offices celebrated therein for ever." And the bishop thereby consecrated the chapel by the name of "the chapel of *St. Mary on Edgehill*, in the parish of *Walton*," and also separated the ground inclosed about the chapel from common and profane uses and consecrated it as "a cemetery or place for the Christian burial of the dead to be there interred as and for the yard of the said chapel," and declared the same to be so separated and consecrated, and that it ought so to remain for ever thereafter. Then there was a proviso that "in order that the erection of this chapel may not prejudice the said vicarage of *Walton*, nor lessen the revenues thereof, there shall be paid to the curate and also to the clerk and sexton of this chapel for the time being, for the performance of the several and respective duties herein, and for the burial of corpses in the yard hereof, double the fees which are usually or of right ought to be paid for every marriage or churching in the parish church of *Walton* aforesaid, or burial in the yard thereof; and the said curate, clerk, and sexton of this chapel for the time being from time to time shall collect and receive such double fees, and account for and pay one moiety or equal half part thereof to the vicar, clerk, and sexton of the said parish church of *Walton* for the time being, to be divided amongst them in such shares and proportions as the fees payable at the said parish church are divided," the same to be so paid by equal half-yearly payments, "and that the remaining moiety or half part thereof shall be divided amongst the curate, clerk, and sexton of this chapel for the time being in such shares and proportions as fees for the like nature and for the like services are usually or of right ought to be paid and divided among the vicar, clerk, and sexton of the said parish church."

In the year 1814 an Act, 54 Geo. 3, c. 192, was passed, intituled "An Act to enable *Edward Mason*, of *Edgehill*, in the parish of *Walton*, in the county of *Lancaster*, to appoint a curate to the new

church or chapel of *Edgehill*, and for other purposes therein mentioned." That Act recited that, by reason of the great increase of inhabitants in the parish of *Walton*, and the parish church not being sufficiently capacious to contain the inhabitants of the parish usually attending divine service, nor the yard of the parish church large enough for the decent interment of the corpses of persons dying within the parish, the inhabitants residing at or near *Edgehill* had been very much in want of a church or chapel: and that *Edward Mason* had lately purchased, appropriated, and set apart a certain piece of ground at *Edgehill* for the site of a church or chapel, together with a yard for a burial-place, which he had enclosed with a wall, and had at his own expense erected a new church or chapel: and that, with the consent and approbation of the patron of the rectory and parish church of *Walton*, and of the rector, and the vicar respectively of the parish and parish church of *Walton*, such new church or chapel had been duly consecrated; and that the yard of such new church or chapel had been also, with the like consent and approbation, set apart for a cemetery: also that it would be a great public convenience if marriages were to be allowed to be celebrated in such new church or chapel. It was then enacted that *Mason* should appoint the first curate or minister of the new church or chapel, and that for periods of twenty-five and forty years from the date of consecration of the church or chapel the nomination of curates or ministers should continue in him as therein mentioned, and that, subject to such right of nomination, the right of presentation should belong to the patron of the said parish church his heirs and assigns for ever.

Sect. 2 provided that, for the maintenance of the minister or curate of the said church or chapel, the persons who should be wardens thereof for the time being in pursuance of the Act should, out of the pew-rents, every year pay to every minister or curate appointed by *Mason*, £150, and to every minister or curate afterwards appointed, £250.

Sect. 3 provided for the recovery of the stipend of the minister or curate.

Sect. 4 enacted: "That it shall and may be lawful for the said *Edward Mason*, his heirs and assigns, to let or sell for the purpose only of attending divine service, and sermons therein, all the

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pews or seats in the said church or chapel of *Edgehill*, and also the vaults or burial places therein or belonging thereto (which are not particularly allotted and appropriated by the act of consecration of the said church or chapel), to any person or persons whomsoever desirous of hiring or purchasing the same, subject nevertheless to the terms and conditions of the said act of consecration, and the provisions of this Act, to and for his and their own use or benefit."

Sect. 5 provided for the solemnization of marriages in the said church and chapel.

Sect. 6 enacted: "That there shall be paid to the minister or curate of the said new church or chapel for the time being, for the performance of the several and respective offices of minister or curate, clerk, and sexton there, double the fees, dues, and perquisites which are usually and of right ought to be paid for every marriage, churching, or burial at the said parish church of *Walton*; and that the minister or curate of the said church or chapel shall, from time to time, collect and receive such double fees, dues, and perquisites, and account for and pay by equal half-yearly payments in every year, (to wit) on the 24th day of June, and the 25th day of December, one half-part thereof to and into the hands of the vicar of the said parish church of *Walton* for the time being, to be divided between him, the clerk, and the sexton of the same parish church within ten days after such vicar shall have received the same, in such shares and proportions as the fees payable at the same church are divided, and that the remaining half-part thereof shall, on the said half-yearly days, be divided between the minister or curate, clerk, and sexton of the said new church or chapel, in such shares and proportions as fees of the like nature and for the like services are usually or of right ought to be divided among the vicar, clerk, and sexton of the same parish church. . . ."

Sect. 10 provided that nothing in the Act should take away or diminish any right, privilege, emolument, fee or benefit, which the patron, rector, or vicar of the parish, or the clerk or sexton of the parish and church of *Walton*, would be entitled to if the Act had not been passed.

In the years 1831 and 1836 two other chapels of ease, called

respectively *St. Ann's*, *Stanley*, and *St. John's*, *Knotty Ash*, with small cemeteries attached, were, in pursuance of the *Church Building Act*, 1 & 2 Will. 4, c. 38, consecrated in the parish of *Walton-on-the-Hill*, under sentences of consecration containing provisions—including the provision as to double fees for burials—similar to those in the sentence of consecration of *St. Mary's*, *Edgehill*. No Act was passed in either of these cases. None of the three chapels of ease had any district attached to them.

By the *Walton-on-the-Hill Rectory Act* (6 & 7 Vict.), 1843—after reciting (among other things) that *John Shaw Leigh* was the patron of the rectory and parish church of *Walton-on-the-Hill*; that the Rev. *Samuel Heathcote* was the rector of such rectory and parish church; that the Rev. *Thomas Moss* was the vicar of the vicarage and parish church of *Walton-on-the-Hill*, and that the said *Samuel Heathcote*, in right of his rectory, was patron of such vicarage and parish church; and also reciting the various then existing *Church Building Acts*—it was enacted (sect. 1.) That all provisions in those Acts should apply to the parish of *Walton-on-the-Hill*, except so far as they were altered by the present Act: (sect. 2.) That the division to be made under those Acts and the present Act should be made as follows (that is to say), the township of *West Derby* should be separated from the said parish or rectory of *Walton-on-the-Hill* and form one distinct rectory or district for ecclesiastical purposes, and all the several other townships, districts or places comprised in the said parish or rectory of *Walton-on-the-Hill* (except the said township of *West Derby*) should form and continue a separate rectory or district for ecclesiastical purposes: (sect. 4.) That as such separation should take place each of the said separate districts should for ever thereafter for all ecclesiastical purposes be a separate parish of itself, and the rector of the district comprising all the said townships, districts or places in the said parish of *Walton-on-the-Hill*, except the said township of *West Derby*, should continue the rector of *Walton-on-the-Hill*, and the rector of the said other distinct rectory should be called by the name of the rector of *West Derby:* (sect. 5.) "That from and after such separation the vicarage of *Walton-on-the-Hill* aforesaid shall not extend over the rectory of *West Derby* so to be created as aforesaid, or the township comprising the

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same, for any ecclesiastical purposes, but that such vicarage shall remain within the limits of the said rectory of *Walton-on-the-Hill*, so to be separated as aforesaid, and that the vicar for the time being of the district comprising the rectory of *Walton-on-the-Hill*, so to be separated as aforesaid, shall continue the vicar of *Walton-on-the-Hill*": (sect. 7.) "That as the district rectory of *West Derby*, to be created as aforesaid, shall be separated as aforesaid, and the rector thereof shall be duly instituted and inducted thereto, the rector for the time being shall have the cure of the souls of the inhabitants of such district to the same extent and in such manner as the present rector and vicar of *Walton-on-the-Hill*, or either of them, may be entitled to, and shall for ever thereafter be subject to such legal provisions as to presentation, institution and induction and to all such ecclesiastical jurisdiction as are now by law applicable to the said present rectory of *Walton-on-the-Hill*, and such incumbent shall, from the time of such his institution and induction as aforesaid, have such and the same authority and powers over the curates and ministers of the several chapels and churches within his ecclesiastical district as the rector and vicar of *Walton-on-the-Hill*, or either of them, are or is now entitled to": (sect. 8.) "That the rectory of *West Derby*, to be created in pursuance of this Act shall be a separate ecclesiastical benefice, and that every incumbent of such rectory shall be a body corporate in the same manner as rectors of any ecclesiastical benefice now are by law, and may take such endowments in lands, tithes or rents or any such augmentation as shall be granted to him or his successors in pursuance of this Act or otherwise": (sect. 9.) "That when such separation shall be effected, all the tithes, tithe-rents, moduses and customary payments arising within the present rectory of *Walton-on-the-Hill* aforesaid (except the tithes, tithe-rents, moduses and customary payments belonging and payable to the vicar for the time being of *Walton-on-the-Hill*) shall be, and the same are hereby from and immediately after such separation as aforesaid, vested in the rectors for the time being of the rectories of *Walton-on-the-Hill* and *West Derby*, so to be separated as aforesaid, and their successors rectors thereof respectively, for ever in equal shares; . . . .:" (sect. 11.) "That the rector or incumbent for the time being of the rectory

of *West Derby* so to be created as aforesaid, shall continue to be entitled (in addition to the provision hereby made for him, and to surplice fees and pew rents arising within the same rectory) to the " several sums of money, endowments and emoluments therein mentioned: (sect. 12.) That the rector and vicar of the said rectory and vicarage of *Walton-on-the-Hill* should, from and after such separation as aforesaid, and for ever thereafter, be exonerated from the cure of the souls of the inhabitants within the district of *West Derby*: (sect. 23.) That it should be lawful for any of the inhabitants within the then parish of *Walton-on-the-Hill* to be buried in the churchyard thereof without being subject or liable to any other fees than would have been payable if the present Act had not been passed, but that such privilege should cease as to the inhabitants of the said district of *West Derby* at the expiration of twenty years next after the separation thereof in pursuance of the present Act.

By an Order in Council dated the 20th of May, 1847, the division of the parish or rectory of *Walton-on-the-Hill* was effected pursuant to the above Act; the three chapels and cemeteries of *St. Mary's*, *St. Ann's*, and *St. John's* being comprised in the newly created rectory or parish of *West Derby*.

In the year 1847 the Plaintiff, the Reverend *John Stewart*, was duly instituted and inducted to the rectory of *West Derby*, and he had been ever since and was now the rector of *West Derby*.

The parish of *West Derby* had separate overseers of the poor, and separately maintained its own poor.

No district had ever been assigned to any of the three chapels of ease, and no order had ever been made for the discontinuance of burials in any of the cemeteries attached thereto.

Burials had from time to time taken place and were still allowed to take place in each of those cemeteries.

In 1884, under the provisions of the various Acts relating to the burial of the dead, a burial ground was provided in and for the parish of *West Derby* by the Defendants, who had been duly appointed under those Acts as a body corporate by the name of "The Burial Board for the Parish of *West Derby* in the County of *Lancaster*," and on part of the land forming the site of the burial-ground, they built a chapel for the performance of the

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burial service according to the rites of the Church of *England*. This chapel, together with a large portion of the burial-ground, was on the 28th of January, 1884, duly consecrated by the bishop of the diocese.

Disputes having arisen between the Plaintiff and the Defendants as to the right to perform the burial service in the consecrated portion of the new burial-ground, and to receive the fees therefor, this action was instituted to ascertain the rights of the parties.

The Plaintiff alleged that the respective ministers or curates, clerks and sextons of the three chapels of ease were respectively entitled to one-half of the fees payable in respect of burials in the respective cemeteries attached to such chapels: that the vicar of *Walton-on-the-Hill* for the time being was entitled to one-half of the said fees (other than the respective fees of the clerk and sexton) which became payable in respect of every burial in any of such cemeteries before the division of the said parish and rectory of *Walton-on-the-Hill;* and that, since such division, the Plaintiff, as rector of *West Derby*, was entitled to one-half of the said fees (other than as last aforesaid) which became payable in respect of every burial which had taken place and would take place in any of such cemeteries.

The Plaintiff further alleged that he was the "incumbent or minister" of the parish of *West Derby*, within the meaning of sects. 32 and 52 of the *Metropolitan Burials Act*, 1852 (15 & 16 Vict. c. 85), an Act extended to the whole of *England* by 16 & 17 Vict. c. 134 (1), and as such alone entitled to exercise such rights

(1) The *Burials Act*, 1852 (15 & 16 Vict. c. 85), is intituled "An Act to amend the laws concerning the burial of the dead in the Metropolis," and the preamble recites that "Whereas it is expedient to repeal 'The *Metropolitan Interments Act*, 1850,' and to make such other provision as hereinafter mentioned in relation to interments in and near the metropolis."

Sects. 32 and 52 are, so far as material, as follows:—

Sect. 32. "From and after the consecration as aforesaid of any burial ground provided under this Act (except any portion thereof intended not to be so consecrated), or where all or any part of such burial ground, by reason of the same having been already consecrated, shall not require to be consecrated, then from and after such time as the bishop of the diocese shall appoint, such burial ground shall be deemed the burial ground of the parish for which the same is provided, and where the same is provided for two or

and to receive such fees: that, before any deceased person was brought to the burial-ground for burial in the consecrated portion thereof, he, the Plaintiff, was entitled to receive convenient notice informing him of the time when such deceased person would be so brought, and that he was entitled, by himself or his curate, or such duly qualified person as he, the Plaintiff, might authorize, to perform the religious service for the burial of the dead according to the rites of the Church of *England*, in the burial of all deceased persons who should be buried in the consecrated portion of the said burial-ground, and that he, the Plaintiff, was entitled

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more parishes such burial ground shall be in law as if such parishes were one parish, and as if such burial ground were the burial ground of such one parish; and every incumbent or minister of the parish or of each of the parishes (as the case may be) for which such burial ground is provided shall, by himself and his curate, or such duly qualified persons as such incumbent or minister may authorize, perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial ground, or in the consecrated portion thereof, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received; and the clerk and sexton of such parish or of each of such parishes shall (when necessary) perform and exercise the same duties and functions in respect of the burial of the remains of parishioners or inhabitants of the parish of which he is clerk or sexton in such burial ground or the consecrated portion thereof, and shall be entitled to receive the same fees on such burials, as he has previously performed and exercised and received, as if such burial ground were the burial ground of the respective parish of such incumbent or minister, clerk and sexton respectively; and the parishioners and inhabitants of such parish or of each of such parishes shall have the same rights of sepulture in such burial ground as they respectively would have had in the burial ground or burial grounds in and for their respective parish, subject nevertheless to the provisions herein contained."

Sect. 52. "'Parish' shall mean every place having separate overseers of the poor, and separately maintaining its own poor. . . ."

"'Incumbent' and 'minister' shall, in respect of any fee made payable to an incumbent or minister under this Act, mean the clergyman who would have been entitled to the fee had the body been buried in the churchyard or burial ground of the parish from which it came, or in the burial ground of the ecclesiastical district in case such district has a burial ground at the passing of this Act, and if any difference shall arise between two or more persons severally claiming to be the incumbent or minister under this provision, such difference shall be determined by the bishop of the diocese."

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to fees in respect of the burial in such consecrated portion of all deceased persons who had been buried there since the consecration, and should in future be buried there, and in respect of the erection of monuments, gravestones, tablets, and monumental inscriptions in such consecrated portion. The Plaintiff claimed (1) a declaration that he was entitled to receive convenient notice before any deceased person was brought to the said burial ground to be buried in the consecrated portion, and was entitled, by himself or his curate, or such duly qualified person as he might authorize, to perform the duties and exercise all rights and authorities for the performance of the religious service for the burial of the dead according to the rites of the Church of *England* in the burial in the consecrated portion of the said burial-ground of all deceased persons who should be buried in such consecrated portion, and in whose burial such service shall be performed; and that he was entitled to fees in respect of the burial in such consecrated portion of all deceased persons who had been buried in such consecrated portion since the consecration thereof, and of all deceased persons who should be buried in such consecrated portion, and to fees in respect of the erection of monuments, gravestones, tablets, and monumental inscriptions in such consecrated portion of the said burial ground: (2.) An account of all sums received by or by the order of the Defendants on account of all such fees as had become payable to the Plaintiff: (3.) Payment of the amount found due: and (4.) An injunction to restrain the Defendants from interfering with the Plaintiff or his curate, or such duly qualified person as the Plaintiff might authorize, in the performance of such religious service as aforesaid in the burial in the consecrated portion of the said burial ground of any deceased person who should be buried in such consecrated portion.

In their statement of defence the Defendants denied that the Plaintiff was entitled to one-half of the fees for burials in the three cemeteries, or that he was the "incumbent or minister" of the parish of *West Derby*, within the meaning of sects. 32 and 52 of the *Burials Act*, 1852, or that he was entitled to receive any such notice as claimed: and they alleged that since the consecration of the consecrated portion of their burial-ground they had on various occasions permitted, and that, unless the Court

decided that it was unlawful to do so, they intended to permit, clergymen other than the Plaintiff, his curates and nominees, to perform the burial service in such consecrated portion in cases in which the relations and friends of the deceased person so desired, or in which for any other special reason it appeared to the Defendants right and expedient so to do: and that, except in such cases, the Defendants had always been willing and desirous that the Plaintiff, as the nearest clergyman, should perform the services and receive the fees; and that it was only in consequence of the Plaintiff's refusal to assent to the Defendants' invitation to provide a clergyman to officiate daily, and of his assertion of his exclusive right to perform the burial service on all occasions, that they made arrangements for the attendance of another clergyman who was now performing the duties. They also denied the right claimed by the Plaintiff to receive notice of any intended burial in the consecrated portion of the said burial-ground, or to perform by himself, or his nominees, the burial service therein, or to receive fees for burial, or in respect of monuments, &c., therein. They further alleged that the only fees they had received for monuments, &c., were those which they were entitled to receive for their own use in accordance with their published table of charges as sanctioned by the Secretary of State; and that they had paid or tendered to the Plaintiff the burial fees in all cases in which, by himself, his curates or nominees, he had performed the service; and they denied his right to any other sums received by them. They then alleged as follows: "There never was at any time previous to the consecration of the said portion of the said burial-ground provided by the Defendants any churchyard or burial-ground of or for the said parish of *West Derby*, and the Plaintiff, as rector of *West Derby*, never enjoyed any rights or authorities for the performance of religious service in the burial of parishioners or inhabitants of the said parish or others, and was never entitled to receive or ever received any fees in respect of such burial. The only churchyard or burial-ground in which the parishioners or inhabitants of *West Derby* ever had any right of sepulture was the churchyard of *Walton-on-the-Hill*. Such rights ceased in 1867

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by virtue of the 23rd section of the said *Walton-on-the-Hill Rectory Act*, 1843, and during its continuance all the clerical rights and fees belonged to the vicar of *Walton*, and not to the Plaintiff. The said parish of *West Derby* is an ecclesiastical district or parish which had not at the passing of the *Burials Act*, 1852, or at any other time (prior to the consecration of the said portion of the Defendants' burial ground) any burial-ground." The Defendants then objected that "the statement of claim is insufficient in point of law because the facts therein do not shew that the Plaintiff is the incumbent or minister of the said parish within the meaning of the 32nd and 52nd section of the *Burial Act*, 1852, and because the statement of claim does not allege or shew that there was any churchyard or burial-ground of or for the said parish (within the meaning of the said section) in respect of burials in which the Plaintiff enjoyed any rights or was entitled to any fees previous to the consecration of the said portion of the burial ground provided by the Defendants."

In his reply the Plaintiff admitted that the right of the parishioners or inhabitants of the parish of *West Derby* to be buried in the churchyard of *Walton-on-the-Hill* ceased in 1867 by virtue of sect. 23 of the Act of 1843, and that during the continuance of the right all clerical rights and fees in respect of the burial of any parishioners or inhabitants of the parish of *West Derby* in such churchyard belonged to the vicar of *Walton-on-the-Hill*, and not to the Plaintiff. He then joined issue on the defence, and the action now came on for trial.

The Plaintiff stated in evidence that, as regards *St. Mary's, Edgehill*, after being appointed rector of *West Derby* he for a short time received half of the fees for burials in that cemetery, but that, by arrangement, he afterwards allowed the minister of *St. Mary's* to receive the fees as a matter of grace only, and not as recognising any right.

It appeared that clergymen permitted or employed by the burial board to officiate in the new burial-ground had been paid for their services out of the fees receivable by the board, but that the total amount of fees actually paid by the board to such clergymen was very small.

Hemming, Q.C., *Jeune*, and *C. Stewart*, for the Plaintiff:—

The cure of souls in a parish carries the right to bury and to take the customary fees, if any, in respect of burials in any old or new burial-ground in the parish: so that, in the case of a rector of a parish without a consecrated burial-ground, if a consecrated burial ground is subsequently added, it becomes the duty and the right of the rector to bury a parishioner there and to take fees for such burial. The vicar of *Walton* had the right of taking fees for burial in the cemetery of *St. Mary's, Edgehill* (and similarly with regard to the other two cemeteries), unless it was taken away by the sentence of consecration and the Act relating to that cemetery. The sentence of consecration and Act merely gave the minister or curate appointed under them the necessary qualification to officiate, not the cure of souls, and expressly saved the rights of the vicar of *Walton*, except as to patronage. The persons to be entitled to burial in the cemetery of *St. Mary's*, were persons dying anywhere within the parish of *Walton*, or parishioners of *Walton*. Then, by the *Walton Rectory Act*, 1843, and the Order in Council of 1847, the parish of *West Derby* was carved out of the parish of *Walton*, and the cure of souls in *West Derby*, including rights as to burials, was taken from the vicar of *Walton* and given to the rector of *West Derby*. Thus the rector of *West Derby* acquired the right to bury, and take half the double fees —such half-fees being in fact the old fees—for burials in *St. Mary's* cemetery, it being within his parish; and, in addition, the other half of the double fees was payable when the burials were performed by the curate or minister under his concurrent qualification.

Even if this is not the true view as to the cemeteries attached to the chapel of ease the Plaintiff has the duties and rights of performing the services and taking the fees incident thereto in the cemetery of the Board, because it is now the burial-ground of his parish. The question mainly turns on the effect of the *Burials Act*, 1852 (15 & 16 Vict. c. 85), as extended by 16 & 17 Vict. c. 134, under which this burial board was created and the new burial-ground made. Sect. 32 of the former Act makes the new cemetery the burial-ground of the parish, and therefore, without more, gives the right to bury and take customary

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fees to the rector of the parish. It goes on to give all rights and fees previously enjoyed; and therefore it extends the rector's right to these, even though he could not prove a custom from immemorial user as before he must have done. Sect. 52 enlarges the meaning of the words "parish" and "incumbent;" it is not exclusive, or to be restricted to the actual definition of those words: *Reg.* v. *Sudbury Burial Board* (1); so that it does not exclude the rights of any one who, independently of the Act, was a rector, though he may not come within the words of that section. The half-fees reserved to the vicar of *Walton* by the sentences of consecration were the old customary fees, and the half-fees payable under them to the curate or minister were new fees created for the first time. By the sentences of consecration the rights of the vicar are expressly saved, and there is nothing to take them away. The same as to the right to officiate in the three cemeteries. "Customary payments," in sect. 9, or "surplice fees," in sect. 11 of the *Walton-on-the-Hill Rectory Act*, 1843, would include burial fees. The intention of that Act was that the customs of *Walton* as regards burials should be kept alive in *West Derby* after the separation of the two parishes, and those customs applied to any new graveyard formed either in *Walton* or *West Derby* in consequence of the old graveyard being full. The two parishes were, after the division, exactly alike in all but name, and the old rights incident to *Walton* attached to *West Derby*, the object of the Act being to divide the rights originally belonging to the vicar of *Walton* between two persons, namely the vicar of *Walton* and the rector of *West Derby*. If the vicar of *Walton* had a customary right to fees for burial in the old graveyard of *Walton* in him he had the same right with regard to any new graveyard in *Walton*, and the Act gave to the rector of *West Derby* the like rights in that parish when formed out of *Walton*. A rector having a cure of souls has a legal right to officiate anywhere within the limits of his parish, and to forbid anyone else officiating there: *Moysey* v. *Hillcoat* (2). The mere fact of the appointment of the Plaintiff as rector of *West Derby* gave him both the rights and emoluments incidental to his office, including the customary right to fees. It would seem that the burial-ground of a parish becomes,

(1) E. B. & E. 264. (2) 2 Hag. Eccl. Rep. 30, 46.

upon consecration, the freehold of the rector, and, although burial in it cannot be refused, the minister has, under the canon law, a right to "convenient notice:" *Titchmarsh* v. *Chapman* (1).

[KAY, J.:—The canon says "church or churchyard" only.]

But the sentence of consecration and the usual surrender to the bishop, are, I submit, *ipso facto* sufficient to make the burial-ground the rector's freehold. That there is jurisdiction both in equity and at common law to deal with a case of this kind is clear from *Hornby* v. *Toxteth Park Burial Board* (2) and *Cronshaw* v. *Wigan Burial Board* (3). The former case deals with another parish, that of *Toxteth Park*, carved out of this very parish of *Walton*, but the case, so far as it relates to burial fees, has no application to the present, inasmuch as there was no incumbent of *Toxteth Park* entitled to rights under sect. 32 of the *Burials Act*, 1852.

[On the question of jurisdiction, *Kay*, J. referred to *Tuckness* v. *Alexander* (4).]

The object of the *Burials Act*, 1852, especially with reference to sects. 32 and 52, is thus stated by Mr. Justice *Byles* in *Day* v. *Peacock* (5): "No one reading the statute can for a moment doubt that the ruling desire of the Legislature was that the clergyman should not be deprived of any of the emoluments he was before entitled to, and that the public should have the same last services performed over them as heretofore." If the Defendants' contention is correct then the rector of *West Derby* will lose the fees which became his upon the separation of *West Derby* under the Act of 1843—fees which had previously belonged to the vicar of *Walton*—and the inhabitants of *West Derby* will lose that right of burial by their incumbent which became theirs under that Act.

Sir *Horace Davey*, Q.C., and *Aspland*, Q.C., for the Defendants, the Burial Board:—

This is not an ecclesiastical burial-ground provided from ecclesiastical resources. It could not have been provided by a church-

(1) 1 Stephens' Laws relating to the Clergy, p. 193.
(2) 31 Beav. 52.
(3) Law Rep. 8 Q. B. 217.
(4) 2 Dr. & Sm. 614, 642.
(5) 18 C. B. (N.S.) 702, 721; 34 L. J. (C.P.) 225, 230.

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rate, and it is doubtful whether it could have been provided by a rate under the *Church Building Acts: Reg.* v. *Abney* (1). As a matter of fact it was provided in the usual way authorized by sect. 19 of the *Burials Act*, 1852, namely, out of the poor-rates. The object of that Act, as shewn especially by sect. 35, was that, on the closing of an old burial-ground and the provision of a new one, the rights then actually vested in and enjoyed by the incumbents of the mother parish and any district parish should be preserved; it was not intended to create for the first time new rights which did not previously exist. Sect. 32 is somewhat inaccurately expressed, but sect. 5 of the Act 20 & 21 Vict. c. 81, on which *Cronshaw* v. *Wigan Burial Board* (2) was decided, and which is applicable to analogous cases, supplies the words wanted here; that is to say, the incumbent of the parish is to perform the same duties and have the same rights and authorities and be entitled to receive the same fees as if the new burial-ground were the burial-ground of the parish. Here the Plaintiff never had a burial-ground belonging to his parish, and therefore it cannot be said that under the Act of separation he, *ipso facto*, became entitled to a fee to which the vicar of *Walton* was alone entitled. Neither can he claim monumental fees which alone belonged to the vicar of *Walton*. This new burial-ground was conveyed to the burial board and no one else.

[*Hemming*:—I admit that it is vested in the board, but only for the purposes of the *Burials Act*: *Baker's* Burial Laws (3).]

The view that the right to burial fees under sect. 32 depends on the previous existence of a parish graveyard, is borne out by the interpretation clause, sect. 52, which shews that the intention of the Act is to preserve existing rights and not to create new ones. From the Act of 1843, which incorporates the *Church Building Acts*, it is clear that *West Derby* was an "ecclesiastical district," and it was an ecclesiastical district which had not "a burial-ground at the passing of the" *Burials Act*; therefore, as regards fees, sects. 32 and 52 do not give the Plaintiff the right he claims. The only fees preserved by the sections are in respect of an old burial-ground in which the parishioners had a right of

(1) 3 E. & B. 779. (2) Law Rep. 8 Q. B. 217.
(3) 5th Ed. p. 278.

sepulture; that is to say, the Act refers only to an old burial-ground belonging to the parish, not to a mere private burial-ground in the parish, such as these three cemeteries, which were vested in trustees as private individuals: *Reg.* v. *Westgate Burial Board* (1). The whole purview of the *Burials Act* was to provide a new burial-ground, where necessary, in which parishioners should have a common law right of burial in respect of which a mandamus would lie. We submit that *Hornby* v. *Toxteth Park Burial Board* (2) governs this case; the only difference—which is immaterial—being that *Toxteth Park*, which had formed part of *Walton* parish, was divided into several parishes with separate incumbents, whereas here there is only one parish and one incumbent. In *Day* v. *Peacock* (3) there was, first, a division of a parish into townships and then a subdivision into districts, and it was held that the incumbents of the districts which had had burial-grounds belonging to them were entitled to fees for interment in a burial-ground provided for the township by a burial board under the *Burials Act*, 1852, to the exclusion of the incumbent of a district which never had a burial-ground. Thus that case applies to a district parish which, as here, had at the time of its formation, no burial-ground. The same principle has been applied to the case of a sexton: *Burial Board of St. Margaret, Rochester*, v. *Thompson* (4).

The only person who may have any rights under the *Burials Act*, such as are now claimed, is the vicar of *Walton*. He alone was prejudiced by the separation of *West Derby* from *Walton*: the rector of *West Derby* never had any such rights, and it would be contrary to the policy of the Act to say that they were created by the Act for the first time. Burial fees are not comprised in the "surplice fees" mentioned in sect. 11 of the Act of 1843. A "surplice fee" is a fee to the person, such as the curate, who performs the service.

Hemming in reply:—

The *Burials Act* absolutely imposes on the incumbent of the parish the duty of burying any corpse brought to this burial-

(1) 31 L. J. (Q.B.) 205.
(2) 31 Beav. 52.
(3) 18 C. B. (N. S.) 702; 34 L. J. (C.P.) 225.
(4) Law Rep. 6 C. P. 445.

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ground for interment, and that duty carries with it the right to receive the customary fees in respect to a burial-ground in the parish of *West Derby;* the right to receive the fees being the necessary accompaniment of the duty. The incumbent is, in fact, entitled to all the fees necessary for the performance of the duties imposed upon him.

[KAY, J.:—*Hornby* v. *Toxteth Park Burial Board* (1) is against you.]

The essence of that case was that none of the plaintiffs were "incumbents" within sect. 32 of the *Burials Act*, 1852. It is difficult to reconcile some of the observations in that case with *Day* v. *Peacock* (2). This new burial-ground is the parish churchyard, and no one but the incumbent of the parish has a right to officiate in it. The object of the Legislature in passing the *Burials Act* was to alter as little as possible existing rights. It was never intended that fees which had been by custom attached to the duty of burial should be severed from it. The scheme of the Act is that a burial in a burial-ground formed under it should be conducted in the same manner as in an ordinary burial-ground of the parish, including the receipt of fees. The vicar of *Walton* had the right to officiate, if he chose, in the three cemeteries, and the right to receive half fees for so doing: these rights passed under the Act of 1843 to the Plaintiff. The sentences of consecration of these cemeteries shew that they were not private burial-grounds, but that everyone in the whole parish of *Walton* had a right of burial there. "Surplice fees" in sect. 11 of the Act of 1843 include burial fees.

[KAY, J.:—Surplice fees are thus referred to in *Stephen's* Commentaries (3): "With respect to the surplice fees, it is said that none are due to the ministers as of common right, but that they depend upon custom only," and for that *Blackstone* and other authorities are referred to.]

The object of the double fees was to make a provision for the officiating curate, while not depriving the rector of his customary fee. The freehold of the three burial-grounds, just as in the case

(1) 31 Beav. 52. (2) 18 C. B. (N.S.) 702; 34 L. J.(C.P.) 225.
(3) 9th Ed. vol. ii. p. 743.

of an ordinary churchyard, is in the rector, subject only to such rights as the burial board has under the *Burials Act*, 1852, and the subsequent Acts of 16 & 17 Vict. c. 134, and 20 & 21 Vict. c. 81.

[KAY, J.:—The general law as to the property in churchyards is thus stated in *Stephen's* Commentaries (1): "In rectories, the chancel and the churchyard also, are the freehold of the rector. In vicarages, the churchyard is the vicar's freehold; the chancel that of the impropriator." Why is that not the case here?]

The question was discussed in *Griffin* v. *Dighton* (2), and it was there treated as undoubted law that the freehold of the church, including the chancel, and also of the churchyard is in the rector, whether spiritual or lay, though the actual right of possession is in the incumbent, who is responsible to the ordinary for the celebration of public worship. Hence the freehold of the three chapel cemeteries vested in the rector of *Walton* and passed to the rector of *West Derby*.

[KAY, J.:—*Champneys* v. *Arrowsmith* (3) seems to be an authority, on the contrary, that the freehold is in the vicar.]

Griffin v. *Dighton* was not cited in that case: moreover in that case the question was only as between the vicar and the persons entitled under *Lord Blandford's Act*, whereas *Griffin* v. *Dighton* is more pertinent to the present case, inasmuch as the contest lay between the vicar and the rector. A burial-ground, by the renunciation of the original owner into the hands of the bishop, and by the subsequent act of consecration, becomes vested, *ipso facto*, in the rector as a corporation sole; and it is said in *Campbell* v. *Mayor of Liverpool* (4) that if it were necessary (which the Court thought it was not) a conveyance of the legal estate would be presumed.

KAY, J., stated the facts, and read the various sections above-mentioned of the *Walton-on-the-Hill Rectory Act*, 1843, observing that the Act contained no special provision as to the double fees which were to be taken in respect of the three cemeteries, and

(1) 9th Ed. vol. ii. p. 717.
(2) 33 L. J. (Q.B.) 29; affirmed on appeal, Ibid. 181.
(3) Law Rep. 2 C. P. 602; 3 C. P. 107.
(4) Law Rep. 9 Eq. 579, 584.

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that they did not seem to be mentioned in the Act at all. His Lordship then proceeded:—

The first question is that of jurisdiction. Now I observe that the pleadings do not raise that question at all. There is no plea as to the jurisdiction of the Court. The question here is one of property, the right to fees; and it is not denied that this Court has the right to exercise, and has been accustomed to exercise, jurisdiction in matters of this kind. I referred during the arguments to a case in which the point was actually raised, or at least occurred. That very learned judge, Vice-Chancellor *Kindersley*, in the case of *Tuckness* v. *Alexander* (1) says this (2):—"I may observe, that I felt not only during the argument but subsequently, some hesitation with regard to the jurisdiction of this Court on a question of this sort. It is very peculiar and novel; but finding in a case which was cited before Vice-Chancellor *Wood*, *Fitzgerald* v. *Champneys* (3), in which very much the same question was suggested on a bill—it was not suggested either to the Vice-Chancellor or by him that there was any want of jurisdiction. The Vice-Chancellor *Wood* granted the relief that was asked on other grounds, and did not entertain the question; and I cannot take on myself to say that I will refuse to exercise that jurisdiction which he has considered this Court possessed over the question, but I had great hesitation on the subject." I confess I should have had great hesitation also if no question of property had been involved. It is now admitted—although at one time it was sought to be argued to the contrary—that no part of the freehold of this new burial-ground is vested in the rector of *West Derby*, but that the freehold is undoubtedly vested in the burial board. Therefore nothing which is now complained of constitutes any interference with the rights of an ecclesiastical corporation sole in a burial-ground vested in it. There is nothing of that kind, nor even has the rector of *West Derby* possession. He has not got that right which either a rector or vicar would have in the case of an ancient parish churchyard. This is a burial-ground instituted under the provisions of an Act of Parliament which keeps the fee simple completely vested in the burial board, who are a corpora-

(1) 2 Dr. & Sm. 614. (2) 2 Dr. & Sm. 642.
(3) 2 J. & H. 31.

tion for that purpose; and therefore the interference complained of with the graves in this burial-ground is not an interference with the soil of the freehold, or property of the rector. No doubt, as regards much of the relief that is asked, it might easily have been obtained in the proper Court for that purpose by complaining of any ecclesiastical persons who came to this consecrated ground and performed the duties which the rector of *West Derby* says are duties which he has the sole right to perform. That would be a way of raising the question for decision by a jurisdiction which no doubt is more familiar with matters of that kind than this Division of the High Court can pretend to be.

But, as I have said, a part—and certainly, having regard to the arguments which have been addressed to me, by no means the most insignificant part—of this litigation arises distinctly on the question of fees. I have the authority of Vice-Chancellor *Kindersley* for saying that this Division of the High Court does entertain jurisdiction to determine the question of the right to fees. So much, therefore, for the question of jurisdiction.

Now, I apply myself to the difficulty which arises mainly on the provisions of the general Act of Parliament which relates to these burial boards, namely, the *Burials Act*, 1852, 15 & 16 Vict. c. 85, a general Act of Parliament, in which, it is most material to observe, both the title and preamble relate to the amendment of the law concerning the burial of the dead in the Metropolis. That Act has been extended by the Act of 16 & 17 Vict. c. 134 to other parts of *England* besides the Metropolis. It is impossible to glance at the first-mentioned Act, or to take the merest survey of it, without seeing that the purpose of it was to provide, first of all, burial-grounds in substitution for the over-crowded burial-grounds existing within the limits of this Metropolis; and, secondly, to provide that those burial-grounds might be used for the purpose, not of one parish only, but, if it was thought fit, of more than one parish of the Metropolis. The Act is now very properly applicable to other analogous cases such as this populous part of the suburbs of *Liverpool*.

I now come to the section on which the argument mainly turns, which is the 32nd section, a section which has been before the Court in several cases; but I do not know whether the particular

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question which is now raised has been so distinctly raised in those cases as it is here. The section provides, that "From and after the consecration as aforesaid of any burial-ground provided under this Act (except any portion thereof intended not to be so consecrated), or where all or any part of such burial-ground, by reason of the same having been already consecrated, shall not require to be consecrated, then, from and after such time as the bishop of the diocese shall appoint, such burial-ground shall be deemed the burial-ground of the parish for which the same is provided."

Now great stress is laid on those words. It is said that they put this burial-ground precisely in the position of an ancient churchyard. I demur at once to that contention. An ancient churchyard is consecrated—the whole of it; this burial-ground has not been wholly consecrated. That is an essential difference between the two cases.

Then the section proceeds; "and where the same is provided for two or more parishes, such burial-ground shall be in law as if such parishes were one parish, and as if such burial-ground were the burial-ground of such one parish; and every incumbent or minister of the parish or of each of the parishes (as the case may be) for which such burial-ground is provided shall, by himself and his curate, or such duly qualified persons as such incumbent or minister may authorize, perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial-ground, or in the consecrated portion thereof, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received." I must take the word "enjoyed" as referring to "duties, rights, and authorities," and "received" as referring to "fees." So that the section reads thus—that the incumbent or minister is to perform the same duties and to have the same rights which he has previously enjoyed, and shall receive the same fees which he has previously received. I think nobody can object to that reading of that part of the Act. The section then proceeds to deal with the duties and fees of the clerk or sexton:—"and the clerk and sexton of such parish or of each of such parishes shall (when necessary) perform and exercise

the same duties and functions in respect of the burial of the remains of parishioners or inhabitants of the parish of which he is clerk or sexton in such burial-ground or the consecrated portion thereof, and shall be entitled to receive the same fees on such burials, as he has previously performed and exercised and received." Then comes an over-riding clause:—"as if such burial-ground were the burial-ground of the respective parish of such incumbent or minister, clerk and sexton respectively." Then it provides that the parishioners and inhabitants of such parishes shall have the same right of sepulture in such burial-ground as they would have had in the burial-grounds of their parishes.

I have now to apply that section to this case; and before doing so, I must read another section on which stress has been laid—the 52nd, which says that the words "'incumbent' and 'minister,' shall, in respect of any fee made payable to an incumbent or minister under this Act, mean the clergyman who would have been entitled to the fee had the body been buried in the churchyard or burial-ground of the parish from which it came"—it is to be observed that this is only in respect of fees—"or in the burial-ground of the ecclesiastical district in case such district has a burial-ground at the passing of this Act, and if any difference shall arise between two or more persons severally claiming to be the incumbent or minister under this provision, such difference shall be determined by the bishop of the diocese."

Now, first of all, I confess I have no hesitation at all in saying that I think the meaning of the 32nd section is that the rector of *West Derby* is obliged to perform that duty in respect of burial in the consecrated portion of this ground which he would have been obliged to perform if it had been the burial-ground of his parish: and the obligation on him to perform the duty seems to me quite absolute by himself or his curate, or such duly qualified person as he may authorize.

Then as to his rights, he is to "have the same rights and authorities as he has previously enjoyed." I take that to mean that if he has enjoyed any special right, as distinguished from his duty, in the ancient churchyard for which this is substituted, then those rights also are to be preserved to him in the new

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burial-ground. That is a point which does not seem to me here to arise at all. I apprehend the first part of sect. 32, which obliges him to perform the "duties," would give him such rights as a rector performing the duties of burial in his own churchyard would have, as such rector, without more words. I take the additional clause, as to "rights and authorities," as meant to refer to any special rights he might have in the churchyard which, under the other provisions of this Act, has been closed and for which the new burial-ground happens to be substituted. That seems to me to give a sufficiently intelligible meaning to all those words of the section.

Now we come to that which is really the difficult part of the case—the question of fees. It is beyond all question that the rector of *West Derby* never was entitled to any fees in respect of any ancient churchyard within this parish of *West Derby*—that he never was entitled to any fees arising from burial in the old graveyard of *Walton*. The Act which separated *West Derby* from *Walton* gave him no such right; and the only question which can be raised on that part of the case is this: Is he or is he not entitled to any portion of the double fees in respect of burials in the three small cemeteries which are within the precincts of this parish of *West Derby*? But, as I have said, in the Act which separated *West Derby* from *Walton* there is not one word of reference to those double fees. I have shewn, in reading the words of the sentence of consecration, that the reason why double fees were imposed was in order to provide a fund to compensate the vicar of *Walton* in respect of the fees which he would lose by reason of the burial of persons in the three cemeteries instead of in the churchyard of *Walton;* but the contention, as I understand it, is, that the moment the separation took place the double fees were to be imposed for burials in the three cemeteries, and that the rector of *West Derby* became entitled to one-half of those double fees. I have asked for some indication in the Act of separation that that was to be his right, but the Act is perfectly silent on the subject. The only section which can be read as referring to it is the 11th, which says that the rector of *West Derby* is to be entitled to "surplice fees." The argument was put thus: the curate or other incumbent in charge of the particular chapel

to which each of these small cemeteries was attached was authorized by the sentence of consecration to exact a double fee in respect of any burial, in order, not that the vicar of *Walton* might be supplied with money, but that he, the curate, might be supplied with money; for it was said that the vicar of *Walton* would have had the right to whatever fee was taken in the cemetery; and that the half that was put on was put on for the benefit of the curate. That is certainly not the language of the sentence of consecration. The language of the sentence of consecration is that a double fee is imposed for the benefit of the vicar of *Walton*, or rather to prevent him suffering loss.

But what reason would there be for giving to the rector of *West Derby* the one-half of this double fee? He suffers no loss; he never had any right to a fee in respect of a burial in the churchyard of *Walton*. It has been attempted to say that the scope of this Act is to give to the rector of *West Derby* all emoluments whatever which the vicar of *Walton* was entitled to in respect of this portion of his former parish. But the scope of the Act is very plain. I have asked for something specific in the Act which gives the half of the double fee. There is nothing whatever in the Act which gives it unless it passes under the words "surplice fees." I turn to the best authority I know of on the subject to ascertain what "surplice fees" are. Surplice fees are thus defined in *Stephen's* Commentaries (1):—"Those fees and dues which go by the name of *surplice fees* (being payable on burials, marriages, and the like) . . . . with respect to the surplice fees, it is said that none are due to the minister as of common right, but that they depend upon special custom only." They are, then, distinguished from Easter offerings, which are dues of common right.

Now can I say that, when the legal meaning of "surplice fees" is payments which the clergy could claim by custom only, and not as of right, the term really includes the one-half of this payment in respect of a burial in a particular cemetery—a payment to which the Act makes no kind of reference, and which is a special fee imposed on people coming to bury their dead there? Surely, if it were intended by this Act of Parliament, in sepa-

(1) 9th Ed. vol. ii. p. 743.

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rating *West Derby* from the parish of *Walton*, to give to the incumbent of the new parish of *West Derby* a moiety of this fee to which the vicar of *Walton* had been entitled under the sentence of consecration and private Act relating to *Edgehill*, and the sentences of consecration of the two other cemeteries, I should have expected it to have been plainly expressed, and not merely referred to by the words "surplice fees."

There is another reason which presses on my mind very much in considering this matter. Is it right, after *West Derby* has been separated from *Walton*, to say that the parishioners of *West Derby* who come to bury their dead in any of these three cemeteries are now to be subjected to these double fees when the reason for the double fees has gone? That is a question which deserves very great consideration; and I by no means think that, since the separation, double fees could be exacted from people who come to bury their dead in these three cemeteries. It is impossible, however, for me to determine that question in the absence of any one representing the parishioners.

Then, supposing double fees could not be exacted, there would remain the fee which the curate or incumbent in charge of the cemetery attached to this particular chapel is entitled to receive for his own benefit. Now is that a fee which the rector of *West Derby* can take from him? I have heard no argument to shew me any reason why the rector of *West Derby* could claim that fee for himself: and, again, that is a question which I could not possibly decide in the absence of the incumbents of these particular chapels of ease, as they have been called. I am not going to decide in their absence that the rector of *West Derby* can claim and take for himself the fees which they are entitled expressly to exact under the Act and sentence of consecration relating to *Edgehill*, and under the sentences of consecration of the two other cemeteries. Those are points which I cannot now determine.

It is said that these fees are within the words "surplice fees" in the 11th section of the Act of separation, and that, seeing that at the time when the burial-ground was established by the burial board, the rector of *West Derby* had a right to receive—and there is some evidence to shew that for a short time he did receive—as to one of the cemeteries, one half of the fees, he has, therefore,

under sect. 32, the right to say, "I have been accustomed to receive burial fees out of these small cemeteries, and I now may impose, under the terms of sect. 32, on every burial which takes place within the new burial-ground belonging to the burial board, the same fee which I have a right to receive, and have been accustomed to receive, in respect of those three cemeteries." That is a proposition which deserves a very great deal of consideration. In the first place, as I have said, I do not see the right; and it is impossible for me to determine that he has the right, in the absence of someone representing the parishioners, and in the absence of the incumbents of the three chapels, though my present impression is that he has not made out the right. And secondly, does sect. 32 mean to refer to a right like that, or does it mean to refer to those fees in the ancient churchyard which, when the new burial-ground is substituted for the ancient churchyard, the incumbent is to receive instead of the old fees?

Now the subject is not entirely untouched by authority, because in the case which has been referred to of *Hornby* v. *Toxteth Park Burial Board* (1), in which Lord *Romilly* delivered a very carefully considered judgment, he is evidently of opinion that sect. 32 does mean to refer to the fees in respect of the ancient graveyard, and not fees in respect of a particular special cemetery like these. Lord *Romilly* says this (2): "If the incumbent of *St. James'* could claim the fees in respect of the burial of persons dying within the district attached to that church; and if the incumbent of *St. John the Baptist* could do the same with respect to the ecclesiastical district so named, then, though not entitled to receive any fees in the character of incumbent of *Toxteth Park*, they might have been entitled, under the provision contained in the 52nd section under the definition of 'incumbent;' and the amount to be received by them must, in case of disagreement, have then been settled by the bishop of the diocese; but such is not the case." And he says in another part of his judgment (3): "Is the plaintiff then an incumbent of the ecclesiastical district within the terms of the definition of the word 'incumbent' in the 52nd section, and as such entitled, as

(1) 31 Beav. 52. (2) 31 Beav. 75.
(3) 31 Beav. 70, 71.

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of right, to the fees in question or to any portion of them? To sustain this, he must establish that he, the clergyman, would have been entitled to the fees, had the body been buried in the churchyard or burial-ground of the parish from which it came. In my opinion, that means, such burial-ground attached to the parish, or the ecclesiastical district of which he is incumbent, as the inhabitant of that district would have had a right to be interred in." I have asked counsel to shew me any provision which gives to the inhabitants of any part of this parish of *West Derby*, or of the ancient parish of *Walton*, a right to be interred in any of these small cemeteries. Nothing express of the kind can be found, and the curious thing is this, that to these chapels of ease there is no district attached, and the cemeteries are not confined to any particular portion of the parish of *Walton-on-the-Hill*, still less of *West Derby*; and I cannot find anywhere that the parishioners of *Walton-on-the-Hill*, or of any district of *Walton-on-the-Hill*, are persons who could claim burial in them as of right. The observations which I have read from the judgment of the Master of the Rolls, shew that, in his view, the 32nd section referred only to such fees as were payable in respect of a churchyard in which the parishioners had the right of sepulture. It is only where an incumbent has been accustomed to receive fees of that kind that he can claim, in respect of a burial-ground established under the general Act, fees at the same rate in respect of burials in the consecrated portion of that burial-ground. Therefore, I am not able to say, upon the evidence before me, or upon such consideration as I am at liberty to give to these Acts of Parliament, in the absence of any one representing the curates of these chapels, that the rector of *West Derby* has made out his right to receive the fees, or any portion of the fees, in respect of burials in these cemeteries. Nor am I able to say that, in respect of burials in these cemeteries, the persons within the precincts of the parish of *Walton*, or of the parish of *West Derby*, had a right of burial: and, accordingly, upon the materials before me, I am not able to say that the rector has a right to impose, in respect of burials in the consecrated portion of the new burial-ground, the same fees which the curate of any one of these chapels of ease was accustomed to receive in respect of burials in the cemetery

attached to that chapel, or one half of those fees, or any portion of them. I understand he does not carry his claim so far as to claim to impose the double fees, because his argument seems to me to preclude that; for if he is entitled to impose any part, he might as well claim to be entitled to impose the whole of a double fee. I am not able to see that he has made out his claim either to impose the double fee or to receive the double fee, or any portion of that fee, or to treat anything received in respect of these cemeteries as the measure of the fee which he has a right to impose under the words of the 32nd section as being a fee which he has been accustomed to receive.

But, then, that does not dispose of the whole case. I have said that, in my opinion, he has a right to perform the duties connected with burials in the consecrated portion of this new burial-ground, and that in respect of that duty he has all the rights which attach to the rector of a parish, as though the burial-ground were the burial-ground of his parish. Now it seems that the burial board has been accustomed to receive fees in respect of the ecclesiastical duties performed in this consecrated ground. I have no materials before me to ascertain what the fees are, and I am not going to deal with them individually. The board has been accustomed to receive the fees in respect of these ecclesiastical duties, and of paying other clergymen—clergymen, I understand, selected and employed by themselves—a remuneration for the performance of their ecclesiastical duties out of the fees so received. I am told that the amount which has been actually paid is very small, and I should not be at all inclined to direct any account, nor do I understand that that is a matter which is pressed. But the question is as to future rights; and holding, as I clearly do, that the rector has the right to claim fees for the performance of religious services in this burial-ground and has the duty in respect of burials imposed on him by the Act of Parliament which I have already stated, it seems to me clear that, if this burial board do receive fees—I do not pause to ask whether they have the right to receive them or not—for the ecclesiastical functions performed in respect of the burials in this consecrated portion of their burial-ground, in future (I will say nothing as to the past) they should pay those fees either to the

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rector, or to any person employed by him in conducting those burials. That, I think, concludes all I need say about the case.

I will make (although in so doing I am a little going out of the functions of this division of the Court) this declaration:—That in the consecrated portion of the burial-ground belonging to this burial board within the parish of *West Derby*, the rector of the parish for the time being is bound, by himself and his curate, or such other qualified person as he may authorize, to perform the duties, and is entitled to have the rights and authorities incident to such duties (and I put those words in expressly, for it is not a case where the previous exercise of such duties in this parish has been established) for the performance of religious services on the burial in such burial-ground, in the consecrated portion thereof, of the remains of parishioners or inhabitants of the parish of *West Derby*.

Then there must be another declaration:—That the Plaintiff is entitled, as the rector of *West Derby*, to receive all such fees as the burial board may themselves collect or receive in respect of such duties of the rector of *West Derby*.

As to the monumental fees, I decline to decide anything on that point, having no evidence before me as to the fees which have been actually received; and I decline, without further evidence upon that point, to express any opinion upon it further than the general indication of my opinion which I have given.

The Plaintiff is entitled to the costs of the action.

Solicitors: *H. S. Russell*, agent for *Parry, Gamon, & Farmer, Chester; Pritchard & Sons*, for *Cleaver, Holden & Co., Liverpool.*

G. I. F. C.

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KEWNEY *v.* ATTRILL.

[1886 K. 259.]

Practice—Partnership Action—Dissolution—Receiver—Judgment Creditor—Charge on Assets.

After judgment had been pronounced in a Chancery action for dissolution of a partnership, and a receiver had been appointed, a creditor obtained judgment in the Queen's Bench Division against the firm for the amount of his debt and costs.

On an application in the Chancery action by the judgment creditor an order was made giving him a charge for his debt and costs on all the partnership moneys come or coming to the receiver; he, the creditor, undertaking to deal with the charge according to the order of the Court; the intention of the Court being to preserve to him all the rights he would have had if he had issued execution and the sheriff had seized and sold the assets on the day the application was made.

UNDER articles dated the 29th of April, 1882, the Plaintiff and Defendant, Messrs. *Kewney & Attrill*, entered into partnership as ironmongers. On the 16th of March, 1886, the writ in this action was issued for taking the partnership accounts, a receiver, and an injunction.

On the 5th of April, 1886, on the Plaintiff's motion for a receiver, judgment was taken by consent for dissolution of the partnership as from the date of the judgment, the usual accounts and inquiries being directed and a receiver ordered to be appointed. On the 19th of October, 1886, an action on a bill of exchange was brought in the Queen's Bench Division against *Kewney* and *Attrill* by Messrs. *Hyam & Co.*, who, on the 27th of November, 1886, recovered judgment against them for £48 14*s.*, principal and interest due on the bill, and £8 costs. A receiver was duly appointed in the Chancery action; and on the 7th of December, 1886, *Hyam & Co.* applied by summons in that action for leave to issue execution under the judgment in the Queen's Bench action, against the partnership assets in the hands of the receiver, but the application was ordered to stand over until the partnership assets had been ascertained.

Hyam & Co. now moved that the order of the 7th of December

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might be discharged, and that they might be at liberty to issue execution against the partnership assets in the hands of the receiver, or that the receiver should pay them their judgment debt and costs out of the assets.

D. L. Alexander, for *Hyam & Co.*:—

Our rights are endangered; for if the partners should be adjudicated bankrupts we should, under sect. 46, sub-sect. 2, of the *Bankruptcy Act*, 1883, lose our priority. So far as we know no act of bankruptcy has been committed at present, but one may occur at any moment. Giving us the liberty we ask is not an act of bankruptcy under the *Bankruptcy Act*, 1883, sect. 46, sub-sect. 3. Leave to issue a writ and to register it will not protect us. Partners cannot postpone payment of their creditors in this way. The appointment of a receiver only means that you cannot touch the assets without leave of the Court. A judgment in a partnership action is not, like a judgment in an administration action, a judgment for all the creditors.

KAY, J.:—

By the appointment of a receiver the Court aims at equality amongst the creditors. If I give you leave it must be on your undertaking to hold the proceeds and deal with them in accordance with any order the Court may make.

A. Whitaker, for the partners:—

It would save expense if the Applicants took a charge on the assets instead of leave to issue execution.

KAY, J.:—

Very well—if there is a bankruptcy the trustee in bankruptcy will take subject to prior equities and therefore subject to a charge. I give the Applicants, the judgment creditors, a charge now on the moneys which are in the hands of or may be taken possession of by the receiver, and they must undertake to deal with the charge according to the order of the Court. The charge will be for the judgment debt and costs and interest at four per cent., and the costs in Chambers and here. The intention of the

Court is to preserve to the Applicants all the rights which they would have had if they had issued execution and the sheriff had seized and sold the assets to-day.

Solicitors: *Spyer & Son; W. Easton.*

G. I. F. C.

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[1881 M. 2741.]

Practice — Administration Action — Further Consideration — Accounts and Inquiries—Absent Parties—Class Representation—Notice of Proceedings—Affidavits on Further Consideration — Rules of Supreme Court, 1883, *Order* XVI.; XXXVII., *r.* 1; LV., *r.* 33.

Persons interested in an estate the subject of an administration action to which they have not been made parties, and whose rights or interests may be affected by an order directing accounts and inquiries, are not bound by the proceedings under that order—at any rate where they ought to be served—unless they are served with notice of the order, or an order has been made appointing a member of their class to represent them in the action.

The practice of the Court as to binding absent parties in an administration action discussed.

Under Order XXXVII., rule 1, the Court may, in an administration action, and after the Chief Clerk has made his certificate, receive, if it thinks fit, fresh affidavit evidence on further consideration.

THIS was an action to ascertain the rights of parties in the proceeds of sale of the *Talbot* estate devised by the will of *John Fretwell* deceased; and, if necessary, for the execution by the Court of the trusts of the will relating to such estate. On the action now coming on upon subsequent further consideration it appeared that a mass of affidavits had been filed upon certain inquiries before the Chief Clerk directed by the previous order on further consideration, and his Lordship deferred making an order on the subsequent further consideration until he had communicated with the Chief Clerk as to the circumstances under which the inquiries had been taken (his Lordship having intimated his opinion that they were premature), and so large a number of affidavits filed.

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The parties interested under the inquiries were very numerous. Some of them were dead at the time the inquiries were being taken, and had, at the date of the Chief Clerk's certificate, no legal personal representative who could be served with the original order on further consideration or notice of the proceedings thereunder. Two other parties interested were living, but had not been served with the order or with notice of the subsequent proceedings, although no order had been made dispensing with service upon them.

A question now arose as to how far absent parties interested under accounts or inquiries in an administration action could be bound by the proceedings.

Another question was whether, after the Chief Clerk's certificate in an administration action, fresh affidavits could be used on the further consideration.

The facts of the case are stated below in his Lordship's judgment.

Millar, Q.C., and *Ingle Joyce*, for the Plaintiffs.

Russell Roberts, *Dunning*, and *G. T. Millar*, for the several Defendants.

M. Malleson, and *R. J. Parker*, for parties having liberty to attend.

1887. Jan. 15. KAY, J.:—

It is important to understand how the interests of persons affected by an account or inquiry directed in an administration action may be bound when they are not actually parties to the action.

By Order XVI., rules 33, 34, 35 and 36, a judgment or order for administration of a trust estate may be obtained by one of the parties interested against the executors or trustees, without serving the other persons interested.

By rule 38 a like judgment or order may be obtained by the executors or trustees against one of the persons interested, without serving the others.

By rule 40, in all these cases, the Judge "may" direct the

other persons interested to be served with notice of the judgment or order, and after such notice they will be bound by the proceedings "as if they had originally been made parties."

If they are not served with such notice they are not bound, unless, under rule 8, they can be considered as represented by the trustees. But if these are the accounting parties, and the question is one of accounts, it would not be a case in which the trustees could represent them.

When the absent parties are numerous, and have the same interest, rule 9 of Order XVI. seems to apply; and if one of them is sued as a defendant an order should be obtained in the form "it appearing that the residuary legatees" (or whatever the class may be) "are numerous, and that *A.* is one of such class, order that *A.* do defend in the cause" (or matter) "on behalf or for the benefit of all persons so interested."

After such an order I conceive the absent parties would be bound as though they had been present throughout. The course to be taken by any one of the class who desires to intervene, is by summons asking to be made a defendant in person. That has been decided in two cases, *Watson* v. *Cave* (1), and *Fraser* v. *Cooper, Hall, & Co.* (2).

When one of the class is plaintiff suing the trustee on behalf of all the class, it would seem from the language of rules 9 and 40 that such an order is not absolutely necessary, because I presume the practice was considered established that one might sue on behalf of all so as to bind the class. But as, under rule 40, the Judge may direct notice of the judgment or order to be served on the others in such a case, and only those so served are bound under the terms of that rule, it seems proper, in order to bind absent parties, to obtain his direction; and if they are numerous, although represented by a plaintiff suing on their behalf, it would be better to obtain an order that the plaintiff, or some other member of the class, should represent them.

By Order LV., rule 33, on a summons to proceed with accounts or inquiries, directions as to the parties to attend are only to be given when the Judge is satisfied that all necessary parties have been served with notice of the judgment or order; but, by rule 35,

(1) 17 Ch. D. 19. (2) 21 Ch. D. 718.

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the Judge on this occasion may dispense with service of notice of the judgment or order upon any particular party "by reason of absence, or for any other sufficient cause." "Party" there means, obviously, "person not a party to the action," but the rule does not say that such person shall be bound by the proceedings. Rule 40 provides for classifying the parties attending. It does not authorize the Judge to dispense with service of notice of the judgment or order. It assumes that all have been served. Then there are certain special orders, such as Order XVI., rule 32—which empowers the Judge to appoint some one to represent an heir, next of kin, or class, in order to determine questions of construction before the parties interested are ascertained, and then to bind them, though not actually present—and rule 46, which applies to the case of a deceased person interested who has no representative, and empowers the Court or a Judge either to proceed in his absence, or to appoint someone to represent his estate. As I read this rule, it is only when someone has been appointed to represent the estate of the deceased person, that such estate can be bound. "The order so made," in the latter part of the rule, obviously means the order appointing a person to represent the estate.

The effect of all these rules is that persons interested in the property which is being administered, and whose rights or interests may be affected by an order directing accounts or inquiries, are not bound—at any rate when they ought to be served with notice of such order—unless they are so served, or unless such a representation order is made as I have mentioned. If service upon them is dispensed with, or if, under Order XVI., rule 46, the Court proceeds in the absence of any one representing them, they are not bound.

Another question of general importance is, in what cases, after a certificate, may affidavits be received to prove facts on further consideration?

By the Act 13 & 14 Vict. c. 35, s. 28, the Court was empowered on further consideration "to receive proof by affidavit of all proper parties being before the Court, and of all such matters as are necessary to be proved for enabling the said Court to order payment of any moneys belonging to any married woman, and of all

such other matters not directly in issue in the cause as in the opinion of the Court may safely and properly be so proved."

By the 46 & 47 Vict. c. 49 (the *Statute Law Revision and Civil Procedure Act*, 1883), s. 3, this statute is repealed.

Order XXXVI., rule 21, as to setting down a cause or matter for further consideration, says nothing about evidence; but Order XXXVII., rule 1, authorizes the Court or Judge "at any time" for sufficient reason to order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial on such conditions as the Court or Judge may think reasonable, and I have no doubt that, under that order, the Court may receive, if it thinks fit, affidavit evidence on further consideration.

Now to deal with the facts of the case before me. *John Fretwell*, by his will, dated the 2nd of December, 1848, devised his *Talbot* estate, with other estates, to trustees upon trust to sell and to stand possessed of the proceeds of the *Talbot* estate, and to invest the same as therein mentioned, and to pay out of the income thereof, or out of the rents and profits until sale, certain life annuities, all of which have ceased except one, which still remains payable; and the testator directed that the surplus of such income and rents should be paid by his trustees into his bankers to be applied in manner thereinafter expressed: And, subject to the trusts aforesaid, the testator directed that his trustees should stand possessed of the capital and income, after the death of the last survivor of the several annuitants, upon trust for division, in the shares therein mentioned, among the children of certain nephews and nieces of the testator (including two nieces, *Ann Newton* and *Mary May*), who should attain twenty-one. And the testator directed that the surplus income and rents he had before directed to be paid into his bankers should be applied, first, in payment of his debts, funeral expenses, the charges of proving and registering his will, and the other expenses attending the execution of the trusts thereof, other than the expenses attending the sale and disposition of the several estates thereinbefore directed to be sold, which were to be paid out of the proceeds of the said respective estates, and then in making certain other payments as therein mentioned; and in

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case, after the death of the last survivor of the several annuitants, there should be any surplus moneys remaining in the hands of his bankers, they were to fall into his residuary personal estate, which the testator gave, as to one moiety, to such of his three great-nephews and great-niece therein named—the great-niece being *Elizabeth Fretwell*—as should attain twenty-one, equally, and as to the other moiety among the children of his said niece, *Mary May*, who should attain twenty-one, equally.

Neither these accumulations nor the proceeds of sale of the *Talbot* estate can be divided until the death of the surviving annuitant.

The testator died on the 5th of June, 1855, that is, more than twenty-one years ago. The *Talbot* estate was sold in the year 1874 and the proceeds were invested according to the will; and after payment of the annuities the surplus rents and profits and income were from time to time paid into the testator's bankers.

Of the annuitants named in the will only one is now living.

The testator's niece, *Mary May*, had several children, including a son, *Henry May*, who was also the surviving executor and trustee of the will, and in 1881 this action was instituted by the Plaintiffs, who were the executors and devisees of trust estates of *Henry May*, against *John Newton* and *Francis Newton*, two of the children of *Ann Newton*, and as such interested in a share of the proceeds of the *Talbot* estate and of the accumulations of surplus income, but not in any share of the residuary personal estate, and against *Washington Teasdale*, the legal personal representative of the testator's great-niece, *Elizabeth Fretwell*, and as such interested in a share of such proceeds, accumulations, and residue, and against the testator's heiress-at-law, *Mary Longbottom*, and her husband, *George Longbottom*, the object of the action being to have the rights and interests of all parties in the proceeds of sale of the *Talbot* estate ascertained and declared; and, if necessary, the execution of the trusts relating to that estate and the proceeds thereof.

By the order on further consideration, dated the 23rd of February, 1883, it was declared that the heir-at-law of the testator was, as from the expiration of twenty-one years from the death of the testator until the death of the last survivor of the several

annuitants, entitled to the surplus income of the proceeds of sale of the *Talbot* estate accrued since the expiration of the twenty-one years, after satisfying the payments under the will, and to the income arisen since the expiration of that period from the accumulation of surplus income or rents and profits accrued prior to the expiration of that period: and the following inquiries were directed:—(1.) Who were the several persons entitled under the will to the moneys to arise from the sale of the *Talbot* estate, and the securities therefor, subject to the trusts declared of such moneys and securities during the lives of the said annuitants and the survivor of them, and to the income thereof after the decease of the last survivor of the said annuitants, and in what shares and proportions? (2.) As to the amount of such proceeds of sale and securities? (3.) Who were the persons now entitled under the will to the accumulations of the surplus rents and profits or income of the *Talbot* estate, or the proceeds of sale thereof, prior to the expiration of twenty-one years from the death of the testator, or to the moneys or securities representing such accumulations (subject to the trusts declared thereof during the lives of the said annuitants and the survivor of them), and to the income of the said accumulations, or the moneys and securities representing the same, after the decease of the last survivor of the said annuitants, and in what shares and proportions? (4.) As to what the accumulations prior to the expiration of twenty-one years from the testator's death consisted of? and (5) who was the testator's heir-at-law?

The Chief Clerk, by his certificate dated the 12th of April, 1886, found, in answer to the first inquiry, that there were thirty-two persons entitled in various shares, the persons entitled to one share being entered as "the mortgagees and assignee in bankruptcy of *Vance Fretwell*," and others being entered, in each case, as "the legal personal representative of" the person named, "when constituted."

The evidence used on this inquiry consists of about thirty-one affidavits, with a very large number of exhibits and probates of wills, and the like. In answer to the third inquiry, ten persons are found entitled, some of whom are described as "the legal personal representatives" of the person named, "when consti-

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tuted." In answer to the fourth inquiry, the Chief Clerk found that the sum of £7525 17*s.* 6*d.* was the amount of accumulations of surplus income accrued prior to the expiration of twenty-one years from the testator's death; and, in answer to the fifth inquiry, that the Defendant, *Mary Longbottom*, the wife of the Defendant, *George Longbottom*, was the testator's heiress-at-law.

No declaration of right can now be made on these inquiries, nor is any such asked for.

No distribution of either fund can take place until the death of the surviving annuitant. For any present purpose the very considerable expense of answering these inquiries has been entirely thrown away. It was the duty of those who had the conduct of this cause not to ask for inquiries of this kind; or, if by inadvertence they happened to be taken, not to prosecute them until the death of the surviving annuitant. When that event happens the inquiries will have to be made again, and I shall reserve all the costs of and occasioned by them until that time.

Before the order on further consideration of the 23rd of February, 1883, an order was made dated the 26th of June, 1882, appointing the Defendants *John Newton* and *Francis Newton* to represent the class entitled to the proceeds of sale of the *Talbot* estate, and the Defendant *Washington Teasdale* to represent the class of persons entitled to the residuary personal estate, "for the purpose of obtaining the judgment of the Court upon the construction of the will." This was plainly under Order XVI., rule 32, and for the hearing on further consideration only.

Before the certificate an order was made, dated the 29th of April, 1884, that for the purpose of proceedings in Chambers under the order of the 23rd of February, 1883, the Plaintiffs and the Defendants, *John Newton* and *Francis Newton*, and *James Newton*, a party attending, should alone attend on the inquiries 2 and 4, and that the Plaintiffs and Defendants and the said *James Newton* only should attend on the remaining inquiries, and that all parties should attend on the certificate.

That was simply a classification order, not an order dispensing with service of the order of the 23rd of February, 1883, on the absent parties.

It is obvious that the order of 23rd of February, 1883, could not be served upon all persons interested in the inquiries, for, as appears from the certificate, many of these were dead without representatives.

Notice of the order of the 23rd of February, 1883, it is stated in the certificate, was served upon five persons who were interested in the proceeds of the *Talbot* estate.

As I have already shewn, the Plaintiffs, and also one of the Defendants, were similarly interested in those proceeds and also in the residue, while other Defendants were interested in the proceeds only. The parties interested in the residue are numerous. Service was dispensed with upon the mortgagees and assignee in bankruptcy of *Vance Fretwell*, who seems to have been interested in both funds.

The Judge in Chambers proceeded in the absence of those who were dead or had no representatives; and there are only two persons interested who are living and could have been but have not been served, and as to whom there has not been any order dispensing with service upon them, or appointing any person to represent them.

The cause now comes on for subsequent further consideration, and no order whatever has been obtained which enables me, on this hearing, to bind absent parties. Yet I am asked, not only to make an order which will do so, but to accept the affidavit of an accountant, which was not before the Judge in Chambers, in order to distinguish different portions of the fund and to apportion the securities.

It seems to me that the best thing I can now do is to make the following order:—

It appearing that the several parties interested in the proceeds of sale of the *Talbot* estate and in the residue respectively are numerous, and that several persons of each class have died and have no legal personal representatives; order that the Defendant *Francis Newton*, one of the class entitled to the proceeds of the *Talbot* estate, do defend in this cause on behalf and for the benefit of all persons interested in the proceeds of the *Talbot* estate, and do represent for the purposes of this action the estate of such of the said persons as have died and have no legal personal representatives; and that the Defendant *Washington Teasdale*, one of the class entitled to the residue, do defend in this cause on behalf and for the benefit of all persons interested in the residue

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of the testator's estate, and do represent, for the purposes of this action, the estates of such of the said last-mentioned persons as have died and have no legal personal representative.

The Court being of opinion that inquiries 1 and 3 ought not to have been prosecuted until after the death of the surviving annuitant, reserve the costs of and attending such inquiries until the distribution of the proceeds of sale of the *Talbot* estate and of the accumulations respectively.

Tax the other costs of the Plaintiffs and Defendants, and of the parties having liberty to attend; the costs of the Plaintiffs the trustees to be taxed as between solicitor and client, including their costs, charges, and expenses properly incurred: order payment of the same out of the £7525 17*s.* 6*d.* and the income of such portion thereof as is required to make such payment, according to the direction in the wlll.

Refer it to Chambers to distinguish which of the existing investments represents (A) £7525 17*s.* 6*d.*, the accumulations to the end of twenty-one years from the testator's death, and (B) the income of that sum from that time and the income which was to be accumulated after that date.

Declare that the Defendant *George Longbottom* and *Mary* his wife are entitled in right of the said *Mary Longbottom* to the investments (B), and to the future income of the £7525 17*s.* 6*d.*, and to the other income directed to be accumulated until the death of the surviving annuitant, or to so much thereof as shall remain after answering the purposes directed by the will, and order transfer and payment to them accordingly.

Liberty to apply.

Solicitors: *Few & Co.*, agents for *Dawson & Chapman, Leeds; Torr, Janeways & Co.; Wadeson & Malleson; Nelson, Barr & Nelson.*

G. I. F. C.

In re TOWNSEND'S ESTATE. TOWNSEND *v.* TOWNSEND.

CHITTY, J.
1886
Dec. 8, 9.

[1886 T. 861.]

Will—Wills Act (1 *Vict. c.* 26), *s.* 15 [*Revised Ed. Statutes, vol. viii., p.* 33]—*Void Life Interest—Acceleration.*

Gift by will of real and personal estate upon trust to convert and pay the income of the proceeds to *A.* for life, and after *A.'s* death to pay the capital and income thereof unto the child or children of *A.* in equal shares, with gifts over in case *A.* should die without leaving issue living at his death.

The will had been attested by *A.'s* wife, so that the gift of a life interest to him was void under sect. 15 of the *Wills Act.* There were no children of *A.'s* marriage. The personal estate was exhausted and the trust funds represented real estate only:—

Held, that until *A.* had a child the gifts upon the determination of *A.'s* life estate could not be accelerated, and that during the life of *A.*, and so long as he had no children, the income of the trust funds was undisposed of, and belonged to the heir-at-law, and could not be accumulated for the benefit of the persons contingently entitled in remainder.

Jull v. *Jacobs* (1) distinguished.

Hodgson v. *Earl of Bective* (2) and *In re Dumble* (3) explained.

ADJOURNED SUMMONS.

By her will dated the 26th of May, 1876, Miss *Townsend* gave all her real and personal estate unto her executors, their heirs, executors, administrators, and assigns respectively, upon trust to sell and to pay the income of the proceeds to *L. H. Townsend* during her life, and after her death to pay the same to testatrix's brother, *W. S. Townsend,* during his life, and after his death to pay the capital and the income thereof unto the child or children of *W. S. Townsend* in equal shares; but in case *W. S. Townsend* died without leaving issue living at his death, then upon trust equally to divide the same between and among the children then living of testatrix's uncle, *William Luck,* and the children of her aunt, *Elizabeth Wall.*

One of the attesting witnesses to the will was *Elizabeth S. Townsend,* then and now the wife of *W. S. Townsend.*

Testatrix died on the 10th of July, 1876, leaving at the time of her death *W. S. Townsend* her heir-at-law and *W. S. Townsend*

(1) 3 Ch. D. 703. (2) 1 H. & M. 376. (3) 23 Ch. D. 360.

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and *L. H. Townsend* next of kin according to the *Statute of Distributions*. The personal estate of the testatrix had been exhausted, and the trust funds, consisting of the proceeds of the sale of the real estate, were now represented by £3046 10*s.* 8*d.* consols. The income had been paid to *L. H. Townsend* until her death on the 20th of July, 1885, but since her death no part of such income had been paid to *W. S. Townsend*, the gift to him having been rendered null and void under the *Wills Act* (1 Vict. c. 26), sect. 15, from his wife having attested the will. *W. S. Townsend* was married in 1869. There had been no issue of the marriage, and his wife, who was still living, was fifty-eight years old.

A summons had been taken out by the surviving trustee and executor for the purpose of obtaining the determination of the following questions in the administration of the estate, under Rules of Supreme Court 1883, Order LV., r. 3 (E.) & (G.):—

1. Whether the income of the proceeds of the real and residuary personal estate of the testatrix ought to be accumulated until the death of *W. S. Townsend*, or until he had issue who attained twenty-one, or during what period? or,

2. Whether there was an intestacy as to such income during the life of *W. S. Townsend* or during any other period, and in that case whether the income, so far as it arose from the proceeds of the sale of real estate, would belong to the heir-at-law, and as to personal estate to the next of kin of testatrix?

G. N. Marcy, for the Plaintiff.

Romer, Q.C., and *W. D. Rawlins*, for the heir-at-law:—

Until it can be ascertained whether or not there will be any child of *W. S. Townsend*, the income which represents real estate only is undisposed of during the life of *W. S. Townsend* (the gift to whom is rendered void by the *Wills Act* (1 Vict. c. 26), sect. 15), and belongs to the heir-at-law: *Wade-Gery* v. *Handley* (1); *Green* v. *Tribe* (2). *Jull* v. *Jacobs* (3) may be relied on in favour of the argument that the income ought to be accumulated during the lifetime of *W. S. Townsend* for the benefit of those entitled in remainder, on the principle that the remainders immediately

(1) 1 Ch. D. 653; 3 Ch. D. 374. (2) 9 Ch. D. 231.
(3) 3 Ch. D. 703.

expectant on the particular estate which is void will be accelerated. But there can be no accumulation in favour of unborn persons, and in *Jull* v. *Jacobs* (1) the persons to take upon the determination of the particular estate were ascertained, as was also the case in *In re Clark* (2). We also submit that the doctrine of acceleration is not applicable to personalty except under special circumstances: *Eavestaff* v. *Austin* (3); *David* v. *Rees* (4); *Jarman* on Wills (5).

S. Hall, for *William Luck*:—

The income of the residuary estate ought during the lifetime of *W. S. Townsend* either to be paid to or accumulated for the benefit of the persons ultimately entitled. Where, as in this case, the residuary estate consists of a blended fund, and the gift is to a class to be ascertained at a future period, there being an immediate gift of the income, then if such immediate gift should in any way fail, the future gift at once takes effect. If real estate alone be the subject of the gift which is to take effect *in futuro*, the immediate rents are, on the common law doctrine, undisposed of, and belong to the heir-at-law. But where the residuary gift is of real and personal estate as one fund, then, inasmuch as the two funds are mixed together, and the gift of the personal estate carries in all cases the intermediate profits, the Court is at liberty to infer from the blending of the realty and personalty an intention that the whole shall go in one course of devolution, and accordingly the gift carries the intermediate rents of the realty as well as the income of the personalty: *Hodgson* v. *Earl of Bective* (6); *In re Dumble* (7). The life estate given to *W. S. Townsend* being, by his incapacity under the *Wills Act*, sect. 15, to take, determined and out of the way, the remainders are accelerated and take effect as if there had been no life estate: *Jull* v. *Jacobs* (8); *Lainson* v. *Lainson* (9); and as the persons entitled to take in remainder cannot now be ascertained, the intermediate income will be accumulated until the determination of the contingency.

(1) 3 Ch. D. 703.
(2) 31 Ch. D. 72.
(3) 19 Beav. 591.
(4) 1 Russ. & My. 687.
(5) 4th Ed., vol. i. pp. 574–5.
(6) 1 H. & M. 376; 10 H. L. C. 656.
(7) 23 Ch. D. 360.
(8) 3 Ch. D. 703, 712.
(9) 18 Beav. 1; 5 D. M. & G. 754.

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Micklem, for children of *Elizabeth Wall*.

G. N. Marcy mentioned the case of a "devise to a monk for life, the remainder to a stranger in fee, and the devisor dies, the monk being alive, in this case the remainder shall take effect presently:" *Perkins* (1).

CHITTY, J.:—

Sect. 15 of the *Wills Act* (1 Vict. c. 26) enacts that gifts to an attesting witness or to the wife or husband of the attesting witness shall be null and void, but does not say that the gift is to be treated as if it were struck out of the will. Whether that is or is not the effect of the section is the question now to be decided. Now in the case before me one of the attesting witnesses was the wife of *W. S. Townsend*, to whom, upon the death of *L. H. Townsend*, the income of the blended fund which results from getting in the real and personal estate of the testatrix is given for life. After his death the executors are to pay the capital and the income of the fund to the children of *W. S. Townsend*, so that his children would take vested interests at their birth. [His Lordship, after stating the remaining provisions of the will, proceeded:—] It is plain on the construction of this will that the persons who take in default of issue of *W. S. Townsend* take contingent interests which cannot be ascertained at the present time, and will not vest until the death of *W. S. Townsend* without leaving issue. It was argued that in the circumstances the proper mode of construing this will with reference to sect. 15 was to accelerate the interests of the children of *W. S. Townsend*, and of the persons who take contingently. In my opinion it is impossible to apply the doctrine of acceleration, and for two reasons: 1. There is no child of *W. S. Townsend* at present; and 2, the gifts to the persons contingently entitled are to take effect at a future time, and the persons to take can only be ascertained at a future time. The doctrine of acceleration cannot, therefore be applied to this case. I accept without question Vice-Chancellor *Malins*' decision in *Jull* v. *Jacobs* (2), and should feel bound to follow it if the case were one which allowed the application of the doctrine of acceleration; but in that case

(1) Page 567 (cited 1 Jarm. on Wills, 4th Ed. p. 574). (2) 3 Ch. D. 703.

the persons entitled in remainder were in existence, and their interests were only postponed in order that their mother (the attesting witness) might have the life estate. It was also held that there was no distinction in this respect between real and personal estate, and that the interests of the remaindermen were to be considered as accelerated, so that the children took just as if their mother had died immediately after the testator.

Then it was argued that, although there could not be acceleration proper, as I must treat this as the gift of a mixed fund *in futuro*, *Hodgson* v. *Earl of Bective* (1), and *In re Dumble* (2), applied, and the income must be accumulated during the life of *W. S. Townsend*. Now I take it that the rule, as illustrated by those cases, that where there is a gift of a mixed fund, the interim rents of the realty, as well as the interim income of the personalty, must be accumulated, and follow the destination of the *corpus*, was founded on the intention of the testator.

But in the will before me I can find no intention to give anything to the persons who are contingently entitled until their interests vest in possession, whereas in *Hodgson* v. *Earl of Bective* and *In re Dumble*, the rule in *Genery* v. *Fitzgerald* (3) was applied in order to effectuate the supposed intention of the testator. It was ingeniously argued that, admitting this to be so, the Court would impute to the testator a fictitious or statutory intention—a compound intention of doing partly what he himself intended to do, and partly what the statute has effected. I do not think it right to attribute to him any such intention. I must therefore hold that the income is undisposed of at the present time; but if there should be a child born to *W. S. Townsend*, then *Jull* v. *Jacobs* (4) would apply, and the interest of the children in remainder would be accelerated. The declaration will be that the Defendant *W. S. Townsend*, as heir-at-law, is entitled to the income of the trust fund during his life or until he has a child born. When a child is born, liberty can be given to such child to apply. I understand there is no personal estate.

Solicitors: *Brownlow & Howe*, for *J. & J. H. Benn, Rugby.*

(1) 1 H. & M. 376.
(2) 23 Ch. D. 360.
(3) Jac. 468.
(4) 3 Ch. D. 703.

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STANFORD *v.* STANFORD.

[1883 S. 5725.]

Will—Gift during Widowhood—Gift over on Death.

Gift by will to testator's widow *A.* during her life provided she remained a widow; and from and after her death or remarriage, to *B.* absolutely, with provisions for maintenance in case *B.* should not have attained twenty-one at the death or remarriage of *A.* In the event (which happened) of *B.* dying during the lifetime of *A.*, then at the death of *A.* the property was given over to testator's brothers and sisters who should be living at *A.'s* death.

B. died an infant and afterwards *A.* married again:—

Held, that upon such remarriage the gift over in favour of testator's brothers and sisters took immediate effect, and was not postponed until *A.'s* death.

FURTHER CONSIDERATION.

C. Stanford, by his will, dated the 26th of February, 1881, gave all the residue of his real and personal estate to his executors upon trust for his wife and child upon conditions thereinafter mentioned. And he directed a valuation to be made of his corn stores for his brother *Thomas* to carry on business there, if willing to do so, by paying a rent at the rate of 4 per cent. per annum upon the valuation; such rent to be paid to testator's executors for his wife, with an option to his brother to purchase by half-yearly or other instalments until the whole should be paid off; such instalments to be held on trust or invested by the executors upon the same trusts as the rest of the trust estate, with a direction to the executors to sell in the event of the brother declining to purchase. The testator also directed that his wife might carry on the business of the *Star Inn*, provided she remained a widow. In the event of her declining or otherwise giving it up or marrying again then everything belonging to him connected therewith (except any household furniture she might select for her use) to be sold and the proceeds invested upon the same trusts as the rest of the trust estate. And the testator thereby gave to his wife the income arising from the whole of his estate during the term of her natural life provided she remained a widow, and from

and after her decease, or when she married again, the testator gave the whole of his estate and effects whatsoever and wheresoever, both real and personal, unto his daughter *Kate* for her own use and benefit absolutely, with provisions for her maintenance in case she should not have attained twenty-one at the death of the testator's wife, or when she should marry again. In the event of his daughter dying during the lifetime of his wife, then at the death of his wife the testator gave the property in equal shares for their own use and benefit absolutely, among all his brothers and sisters who should be living at the death of his wife and the issue of such of them as should be dead (such issue taking only the share to which the deceased parent, if surviving, would have been entitled).

The testator died on the 4th of March, 1881.

His daughter, *Kate Stanford*, died, an infant, on the 2nd of June, 1881; and on the 7th of December, 1882, his widow was married to the Plaintiff *A. J. Wood*.

In pursuance of the option given by the will the testator's brother *Thomas* had purchased the corn stores at the valuation price of £593 16*s*.

A summons for administration of the testator's estate was taken out in 1883 by *W. J. Stanford*, a brother of the testator, and *A. J. Wood* and his wife (testator's widow); and the usual administration order was made.

The question now raised on further consideration was, whether on the marriage of the widow, assuming that her interest thereby became forfeited, the testator's estate went over at once to the brothers and sisters, or was to be accumulated until the death of the widow, and then paid to those who should then be living.

Woodroffe, for the Plaintiffs, submitted that having regard to the terms of the gift over the widow was entitled to the income of the testator's estate during her life, but if not, then that there was an intestacy until her death.

Muir, for the executors:—

Upon the whole scope of this will the residue passes to the brothers and sisters upon the marriage of the widow, and the

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failure of the gift to the child by her death in her mother's lifetime. Although the gift over is in terms limited to the death of the widow it will be extended by implication so as to take effect upon the determination of the widow's estate by marriage. In the converse case of a gift over on the second marriage of a wife, the gift over has been held to take effect on her death even though she does not marry again: *Underhill* v. *Roden* (1); *Eaton* v. *Hewitt* (2); *Browne* v. *Hammond* (3); *Jarman* on Wills (4); *Bainbridge* v. *Cream* (5). And this seems to have been approved, though the point was not actually decided, in *Rhodes* v. *Rhodes* (6) where Lord Blackburn says (7): "All absurdity and incongruity is removed . . . if the words 'from and after the decease of my said wife' are construed as having been shewn to have been used as confined to such property as she took an interest in terminable at her death. . . . Whether it is proper to construe them as also meaning on the failure of the interest before her death is a question which does not arise yet, and may never arise, as Mrs. *Rhodes* may never marry. . . . Their Lordships do not therefore decide this, though they wish to say that they are not to be understood as expressing an opinion against this construction." In this case the second marriage has according to the will clearly put an end to the widow's life estate, and the brothers and sisters of the testator living at such determination of her estate are absolutely entitled.

CHITTY, J.:—

With respect to the rent of the corn stores payable by testator's brother *Thomas* "to my executors for my said wife in quarterly or half-yearly payments as they shall determine," if that had been all, the widow would be entitled to receive the rent so long as it was payable. But the rent ceased by the purchase made by the brother under the option given to him by the will, and the proceeds were directed to be invested by the executors upon the same trusts as the rest of the testator's trust estate. In my opinion

(1) 2 Ch. D. 494.
(2) 2 Dr. & Sm. 184.
(3) Joh. 210.
(4) 4th Ed. vol. i. p. 804.
(5) 16 Beav. 25.
(6) 7 App. Cas. 192.
(7) 7 App. Cas. 216.

she is not entitled to the rent of this property after she married again, because there is an intention expressed on the face of the will that the widow was only to have the income of the trust property during widowhood, and the subsequent expressions are enough to include the rent in question, even if it had not ceased by the purchase. But then there arises this further question upon the terms of the gift over. The gift of income to the widow was made determinable on her second marriage, and then followed a gift by way of remainder to testator's daughter, which created a vested interest in the daughter on the determination of the prior estate, liable to be divested in the event of her dying in the lifetime of her mother. Then comes a limitation very inartificially framed, viz., that in the event of the daughter dying during the lifetime of the wife "then at the death of my said wife," the testator gave his estate in equal shares among all his brothers and sisters "who shall be living at the death of my said wife." The child survived her father, but died before her mother married again. Reading the words of the will strictly, the property did not become the property of the brothers and sisters until the death of the widow, and therefore the income would have to be accumulated for their benefit during the life of the widow. The testator has expressed himself imperfectly, but, having regard to the clear expression of his intention in the former part of the will, what he really meant was to make a gift in favour of his brothers and sisters on the determination of the prior interest given to the widow either by her second marriage or death. It is a well-established rule that where a life interest is given to a woman if she so long remains unmarried, with a direction that in the event of her marrying the property shall go over to another, "although, according to the strict language, the gift over is expressed only to take effect in the event of the marriage of the tenant for life, the gift over is held to take effect, even though the tenant for life does not marry." This general rule was cited with approval in the terms I have quoted by the late Master of the Rolls in *Underhill* v. *Roden* (1). The case here is the converse case of a gift over upon the death of the woman whose estate had previously been made determinable upon her second marriage;

(1) 2 Ch. D. 497.

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and, applying the principle thus enunciated, I ought to hold that no distinction can be drawn between a limitation over on marriage and one on death. I thus get over the imperfection of this will, and read it as saying that on the determination by any means of the widow's life estate the gift over in favour of the brothers and sisters takes effect. *Bainbridge* v. *Cream* (1) is a direct authority on this case, and there, though the words were not so difficult as in this case, Lord *Romilly* got over the difficulty by holding that the property became immediately distributable upon the second marriage of the widow. In the events that have happened the brothers and sisters of the testator living when the widow's interest ceased by her second marriage are absolutely entitled.

Solicitors: *Morrisons*, agents for *G. C. Morrison, Reigate; Head, East Grinstead.*

(1) 16 Beav. 25.

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OLLEY *v.* FISHER.

NORTH, J.

1886

Nov. 29, 30.

[1885 O. 75.]

Specific Performance — Rectification of Agreement — Mutual Mistake — Parol Evidence—Statute of Frauds—Part Performance—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7 [*Revised Ed. Statutes, vol. xvii., p.* 77].

Since the *Judicature Act*, 1873, the Court has jurisdiction (in any case in which the *Statute of Frauds* is not a bar), in one and the same action, to rectify a written agreement, upon parol evidence of mistake, and to order the agreement as rectified to be specifically performed.

ACTION for the rectification of a written agreement, and for damages for the breach of the agreement as rectified.

On the 31st of January, 1884, an agreement in writing was entered into between the Plaintiff and the Defendant, by which the Plaintiff agreed, within nine months from the date of the agreement, to erect and finish, fit for habitation, on a piece of ground at *Lewisham*, in the county of *Kent*, belonging to the Defendant, six houses, according to certain specifications and plans, to the reasonable satisfaction of the Defendant's surveyor, and the Defendant agreed (*inter alia*) within three months from the completion of the houses, to erect a bridge over the river *Ravensbourne*, as shewn in a plan annexed to the agreement. The Defendant also agreed to grant the Plaintiff leases of the ground and houses, at a specified aggregate ground rent.

The Plaintiff within the nine months erected and finished four houses on the land, to the satisfaction of the Defendant's surveyor. The Plaintiff alleged that he executed the agreement under a mistake, induced by the negligence of the Defendant, and believing that it provided that he should erect on the land (not six houses) but four, which was the number actually agreed upon between the Plaintiff and the Defendant, and the Plaintiff alleged that the Defendant was attempting wrongfully and fraudulently to take advantage of this mistake. The Defendant had not, within three months from the completion of the four houses, erected the bridge over the river.

The Plaintiff claimed rectification of the agreement, by striking

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out the number "six" and inserting in lieu thereof the number "four," as the number of houses thereby agreed to be erected and finished by the Plaintiff; and damages for the breach of the agreement by the Defendant.

By his statement of defence the Defendant insisted that the written agreement correctly expressed the terms of the real agreement between himself and the Plaintiff, and denied that he had made any default in the performance of his part of the agreement, but he did not plead the *Statute of Frauds*.

Cozens-Hardy, Q.C., and *C. Easton Jolliffe*, for the Plaintiff, opened the case, and proposed to read letters between the parties, and to call the Plaintiff, to prove the alleged mistake in the written agreement.

Cookson, Q.C., and *Bush*, Q.C., for the Defendant:—

No damage can arise to the Plaintiff, unless he is entitled to a lease, and therefore this is in substance an action for specific performance, and in such an action the Plaintiff cannot adduce parol evidence to vary the written agreement, and at the same time claim specific performance of the agreement as varied. Mutual mistake is available as a defence to an action for specific performance, but a Plaintiff cannot have specific performance of a written agreement, with a variation, upon parol evidence, unless the Defendant admits the mistake by his pleading: *Woollam* v. *Hearn* (1); *Marquis Townshend* v. *Stangroom* (2); *Clinan* v. *Cooke* (3); *Attorney-General* v. *Sitwell* (4); *Sugden's* Vendors and Purchasers (5); *Fry* on Specific Performance (6).

[NORTH, J., referred to the notes on *Woollam* v. *Hearn* in *White & Tudor's* Leading Cases (7).]

The admission of such evidence would be contrary to the *Statute of Frauds*.

[NORTH, J.:—The Defendant has not pleaded the *Statute of*

(1) 7 Ves. 211.
(2) 6 Ves. 328.
(3) 1 Sch. & Lef. 22, 38.
(4) 1 Y. & C. Ex. 559.
(5) 14th Ed. pp. 158, 159.
(6) 2nd Ed. pl. 787.
(7) 6th Ed. vol. ii. pp. 517–19.

Frauds, and, moreover, there has been part performance of the agreement by the building of the houses.]

It is not necessary expressly to plead the statute: *Eastwood* v. *Kenyon* (1); *Buttemere* v. *Hayes* (2).

The doctrine of part performance applies only when there is no written agreement, or no valid written agreement. Here the building of the houses is referable to the written agreement as it stands: *Fry* on Specific Performance (3); *Sugden's* Vendors and Purchasers (4).

NORTH, J.:—

I am quite clear that the evidence is admissible, not for the purpose of interpreting the written contract as it stands, but to shew that the written contract ought to be different from that which it actually is.

Cozens-Hardy, Q.C.:—This view of your Lordship is confirmed by *Hodgkinson* v. *Wyatt* (5); and *Stedman* v. *Collett* (6).

The Plaintiff was then called and examined, but, before his examination was concluded, the parties agreed upon a compromise of the action.

NORTH, J.:—

I desire to add that I did not feel the slightest difficulty in admitting parol evidence for the purpose of rectifying the written contract, and shewing that the word "six" in it ought to have been written "four;" nor should I, if the evidence had shewn that the contract ought to be so rectified, have felt any difficulty, the *Statute of Frauds* not having been pleaded (as indeed, by reason of the part performance, it could not be), in going on to give consequential relief in the nature of specific performance on the footing of the contract as rectified, upon the principle pointed out by Lord Justice *Fry*, in his book on Specific Performance (7), viz., that under sect. 24, sub-sect. 7, of the *Judicature Act*, 1873,

(1) 11 A. & E. 438.
(2) 5 M. & W. 456.
(3) 2nd Ed. pl. 557 *et seq.*
(4) 14th Ed. p. 151.
(5) 9 Beav. 566.
(6) 17 Beav. 608.
(7) 2nd Ed. pl. 799.

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the Court can now have no difficulty in entertaining an action for the reformation of a contract and for the specific performance of the reformed contract in every case in which the *Statute of Frauds* does not create a bar.

Solicitors for Plaintiff: *Hepburn, Son, & Cutcliffe.*
Solicitor for Defendant: *H. S. Winnett.*

W. L. C.

NORTH, J. 1886 *Dec.* 4, 7.

In re COATES TO PARSONS.

[1866 C. 2311.]

Power of Appointment — New Trustees — "Continuing Trustee" — "Contrary Intention" — Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 31, *sub-ss.* 1, 3, 6, 7.

On a summons under the *Vendor and Purchaser Act*, 1874, an objection was taken by a purchaser from trustees that an appointment of one of their number, under the power given by sect. 31 of the *Conveyancing Act*, 1881, in the place of a trustee who had been abroad for more than twelve months, was invalid because that trustee had not joined in making the appointment:—

Held, that, there being no evidence that the absent trustee was either willing or competent to join in making the appointment, the objection could not be sustained.

The instrument creating a trust cannot be taken to have expressed a contrary intention within sub-s. 7 of sect. 31 of the *Conveyancing Act*, 1881, merely because it does not provide for filling up a vacancy in the number of the trustees upon the happening of an event not contemplated by the parties to that instrument.

Semble, that if a trust deed contained a power to appoint new trustees expressed in the same words as sub-s. 1 of sect. 31, without anything more, it would not be necessary that a retiring trustee should join in the appointment of his successor. In such a case the words "continuing trustee" would mean only a trustee who is to continue to act in the trusts after the completion of the appointment.

Travis v. *Illingworth* (1) and *In re Norris* (2) approved.

Opinion of *Bacon*, V.C., in *In re Glenny and Hartley* (3) dissented from.

SUMMONS by vendors, under the *Vendor and Purchaser Act*, 1874, raising the question whether an appointment of a new trustee had been validly made.

(1) 2 Dr. & Sm. 344. (2) 27 Ch. D. 333.
(3) 25 Ch. D. 611.

By a deed dated the 6th of July, 1875, a piece of land at *Thrapston*, with a chapel erected thereon, was conveyed in fee to eleven persons, of whom *John Smith*, *William Coates*, *W. R. Dearlove*, and *Ralph Dearlove* were four, in fee, upon the same trusts, and subject to the same powers and provisions, as were contained in a deed called the model deed of trust for *Wesleyan Methodist* chapels, as if the same were therein repeated and made applicable to the hereditaments thereby conveyed.

The model deed contained the following power of appointing new trustees:—

"Provided always, and it is hereby declared, that from time to time, and at all times hereafter, when and so often as the trustees for the time being of these presents shall by death, incapacity, or refusal to act in the trusts of these presents, or otherwise, be reduced to the number of five trustees, then and in every such case the superintendent preacher for the time being of the circuit in which the said chapel or place of religious worship happens for the time being to be situate, shall at a meeting of the trustees for the time being of these presents, and of such superintendent preacher (such meeting to be convened in manner as is hereinbefore mentioned and directed respecting special meetings), nominate as many persons, being members of the said society of the people called *Methodists*, in the circuit in which the said chapel or place of religious worship shall for the time being be situate (if a sufficient number of such persons can be found willing to take upon themselves the burden and due exercise of the trusts hereby declared, and, if not, then being members of the said society in that and some neighbouring or other circuits or circuit) as the said superintendent for the time being shall deem to be suitable persons, being not fewer than twice the number of trustees then to be chosen, elected, and appointed (unless the old continuing trustees shall be satisfied with his nominating a less number), and the old trustees for the time being, or the major part of them, present at such meeting shall thereupon choose, elect, or appoint, from amongst the said persons nominated as aforesaid, so many persons to be trustees of the said piece of ground, chapel, or place of religious worship and premises, as shall, together with such of the old trustees as shall

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continue in the trusts of these presents, make up in the whole the original number of trustees; or, if none of the old trustees shall continue in the trusts of these presents, then, shall choose, elect and appoint so many of the persons nominated as aforesaid as shall be equal to the original number of trustees . . . . Provided always, and it is hereby directed, that from time to time and at all times hereafter, although the trustees for the time being of these presents shall not be reduced to the number of five, or if (through accident, neglect, or otherwise the appointment of new trustees shall not be made upon their being reduced to that number, and they shall be reduced to any less number than five) then, and in either of the said cases, it shall be lawful for the said superintendent preacher, and the then surviving trustees or trustee, or the major part of those present at any meeting convened in manner as is hereinbefore mentioned and directed respecting special meetings, to exercise and execute the power hereinbefore contained for the nomination, choice, and appointment of new trustees." Power was also given to increase the number of trustees, so that the total number of trustees should not exceed thirty.

On the 15th of March, 1886, *Ralph Dearlove* was dead, and *W. R. Dearlove* had remained out of the *United Kingdom* for more than twelve months, and by a deed dated on that day, and made between the other nine original trustees, of the first part; the Rev. *Joseph Howard*, the then superintendent minister or preacher in the circuit in which the chapel was situate, of the second part; and *T. M. Coleman*, of the third part; after recitals of the death of *Ralph Dearlove* and the absence abroad of *W. R. Dearlove*, and a recital that the power of appointing new trustees contained in the model deed did not apply to vacancies occasioned by absence from the *United Kingdom*, it was witnessed that, in exercise of the power to appoint new trustees conferred by the *Conveyancing Act*, 1881, and of every other power enabling them in that behalf, the persons parties thereto of the first part, with the approbation of the said *Joseph Howard* as such superintendent minister, did appoint *Coleman* to be a trustee of the trust premises in the place of *W. R. Dearlove*, and *Coleman* did testify and declare his acceptance of the trusteeship. And in pursuance of the appointment

the persons parties thereto of the first part did declare that all the estate and interest of themselves and of *W. R. Dearlove* and of every of them in the trust premises should vest in the parties thereto of the first and third parts in joint tenancy in fee simple, upon the trusts and subject to the powers in the deed of the 6th of July, 1875, expressed and contained or referred to.

After this *Coates* and *Smith*, on behalf of the ten trustees, entered into an agreement to sell the chapel in fee to *A. E. Parsons*.

The purchaser objected to the title shewn by the vendors to the property, that the appointment of the 15th of March, 1886, was invalid, (1) because *W. R. Dearlove* did not concur in it; (2) because on the appointment the original number of trustees was not filled up.

The vendors took out the present summons, asking for a declaration that the objections were invalid.

Bunting, for the vendors:—

(1.) It was not necessary that the retiring trustee, *W. R. Dearlove*, should join in making the appointment of a new trustee; he was not a "continuing trustee" within the meaning of sub-sect. 1 of sect. 31 (1) of the *Conveyancing Act*, 1881, under which the

(1) Sect. 31 provides by sub-sect. 1 (*inter alia*) that "where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the *United Kingdom* for more than twelve months . . . . then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the *United Kingdom*, or . . . . as aforesaid.

Sub-sect. 3. "On an appointment of a new trustee, it shall not be obligatory . . . . to fill up the original number of trustees, where more than two trustees were originally appointed.

Sub-sect. 6. "The provisions of this section . . . . relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the exercise of the provisions of this section.

Sub-sect. 7. "This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained."

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appointment was made: *Travis* v. *Illingworth* (1); *In re Norris* (2). A "continuing trustee" means a trustee who is to continue to act as such after the appointment of the new trustee is made, not one who ceases to be a trustee on the exercise of the appointment. No doubt in *In re Glenny and Hartley* (3) Vice-Chancellor *Bacon* expressed an opinion that a retiring trustee was a "continuing" trustee for the purpose of appointing a new trustee, but that opinion was not absolutely necessary to the decision of the particular case before him, and the opinions of the other Judges are to be preferred.

Sub-sect. 6 does not apply to the present case, at any rate, not unless it were shewn that *W. R. Dearlove* was willing to join in making the appointment. There is no evidence of that. The power contained in the "model deed" does not meet the present case.

(2.) The appointment being made under the power conferred by the *Conveyancing Act*, sub-sect. 3 of sect. 31 is express that the original number of trustees need not be filled up. At any rate, the omission to fill up the number cannot affect the validity of the particular appointment.

[He was stopped by the Court.]

E. Ford, for the purchaser:—

I rely on the opinion expressed by Vice-Chancellor *Bacon* in *In re Glenny and Hartley*. His decision did not turn only upon the peculiar words of the deed then before him. A man does not cease to be a trustee by remaining abroad for twelve months, though the *Conveyancing Act* gives power in that case to appoint another trustee in his place. He might return and exercise the powers of a trustee. He "continues" to be a trustee until he is displaced by the appointment of a new trustee.

The Court could make an appointment under the *Trustee Act*.

(2.) A "contrary intention" is shewn by the model deed, and therefore sub-sect. 3 of sect. 31 does not apply.

In the case of a charity the full number of the trustees ought to be kept up. At any rate, that is the practice. And in *In re*

(1) 2 Dr. & Sm. 344. (2) 27 Ch. D. 333.
(3) 25 Ch. D. 611.

Cunningham (1), *Jessel*, M.R., said, that "he was not aware of any rule making it compulsory on the donees of a power appointing new trustees to keep up the full number of trustees, except in the case of a charity."

In the model deed there is no power to reduce the number of trustees, though there is a power to increase the number. Moreover, the appointment ought to be made at a formal meeting of the trustees.

Bunting, in reply:—

The last objection really comes to this, that the Act does not apply at all to trustees of *Wesleyan* chapels. But no "contrary intention" is expressed in the model deed; it only provides a method of procedure different from that which is prescribed by the Act. Moreover, the appointment was made under circumstances which are not contemplated by the model deed, and as to which no intention whatever is expressed by that deed: *Cecil* v. *Langdon* (2). The words "or otherwise" in the deed do not apply to the case of a vacancy which was not in the contemplation of the parties. The Act does not say that a trustee who remains abroad shall *ipso facto* cease to be a trustee, but it gives power to substitute another in his place.

[He referred to *In re Walker and Hughes' Contract* (3).]

1886. Dec. 7. NORTH, J. (after stating the facts and the nature of the purchaser's objections, continued):—

Of the two objections which have been taken, the first, that *William Ralph Dearlove* did not concur in making the appointment is avowedly based on certain observations of *Bacon*, V.C., in *In re Glenny and Hartley* (4).

Before the *Conveyancing Act*, 1881, the law on the point stood thus. It had been decided by *Kindersley*, V.C., in *Travis* v. *Illingworth* (5), that a power given to the continuing trustees or trustee to fill up vacancies in the trusteeship cannot be exercised by a retiring trustee. In that case there were originally three

(1) W. N. 1877, p. 258.
(2) 28 Ch. D. 1.
(3) 24 Ch. D. 698.
(4) 25 Ch. D. 611.
(5) 2 Dr. & Sm. 344.

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trustees, and two of them had died. The power to appoint new trustees was given to the surviving or continuing trustees or trustee, and it was exercised by a person who did not intend to continue to act in the trust, but was retiring, and he appointed two other persons to be trustees in his place. The Vice-Chancellor held that the retiring trustee did not come within the words "surviving trustee" contained in the power, and that he was not a "continuing trustee," those words applying to a person who was continuing to act in the trust together with the trustees or trustee newly appointed, and not to a person who was not to continue to be a trustee after the new trustees were appointed, but who ceased to be a trustee at the moment when they were appointed. In *In re Glenny and Hartley* (1), *Bacon*, V.C., held that a "retiring trustee" might be a "continuing trustee," until he had executed an appointment of new trustees. In the deed then before him there were some words which shewed that, according to its true construction, the words "continuing trustees or trustee" included and applied to a retiring trustee. Therefore that decision does not really meet the point. But the Vice-Chancellor did no doubt make some observations on *Travis* v. *Illingworth* (2) which clearly indicated that in his view a person who was retiring from being a trustee was nevertheless a "continuing trustee" for the purpose of appointing new trustees. The same point came before *Pearson*, J., in *In re Norris* (3). There a trustee, who certainly was a continuing trustee, because he did not retire, appointed another trustee in the place of a trustee who was about to retire, and the objection was made that the continuing trustee could not alone exercise the power, but that it ought to have been exercised jointly by him and the retiring trustee. *Pearson*, J., following *Travis* v. *Illingworth*, held that the continuing trustee alone was competent to exercise the power, and that the retiring trustee was not a continuing trustee. If, therefore, I had to decide upon the footing of those cases only, I should feel bound to follow *Travis* v. *Illingworth* and *In re Norris*, notwithstanding the expression of opinion by *Bacon*, V.C., in *In re Glenny and Hartley*.

(1) 25 Ch. D. 611. (2) 2 Dr. & Sm. 344.
(3) 27 Ch. D. 333.

But, in my opinion, the present question really turns upon the construction of sect. 31 of the *Conveyancing Act*, 1881, and not upon those decisions. If I were dealing with an instrument containing a power to appoint new trustees expressed in the words of sub-sect. 1 of sect. 31, and not containing anything further, I should, for the reasons which I have stated, come to the conclusion that the persons who were continuing to act as trustees had the power of appointing new trustees, without the concurrence of a person who was ceasing to be a trustee by virtue of the appointment.

But it seems to me that the question is settled by sub-sect. 6 of sect. 31 of the *Conveyancing Act*, which provides that the provisions of that section "relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section." In the present case there is nothing to shew that *W. R. Dearlove* was willing or competent to act in the exercise of the power, or even that it was known where he was. Although by sub-sect. 6 of sect. 31, the term "continuing trustee" is to include a retiring trustee, if he is willing to act for the purpose, it seems to me that, independently of that provision, the term "continuing trustee" would not include such a person, and that it can by virtue of that provision include him only in case it is shewn that the retiring trustee is competent and willing to act in the exercise of the provisions of that section. I hold, therefore, that under the terms of the Act the nine trustees, who were clearly continuing trustees were competent to make the appointment, unless it were shewn that the person who had been absent for so long, and in whose place there was a clear right to substitute a new trustee, was willing and competent to act. This has not been shewn, and it seems to me, therefore, that the first objection, viz. that *W. R. Dearlove* ought to have concurred in making the appointment, is not established.

The second objection is, that on the appointment the original number of trustees was not filled up. Now when the appointment was made *Ralph Dearlove* was dead, and therefore there were left either ten or nine continuing trustees. The nine appointed a tenth, but they did not fill up the number to the

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original number of eleven. Were they bound to do so? In my opinion they were not. No one can read the power of appointing trustees contained in the model deed without seeing that it was contemplated that five trustees would be enough, and that the trustees might be allowed gradually to diminish in number down to five, without any new appointment being made. When they were reduced to five a new appointment was to be made, but, so long as there was a natural decrease till the number reached five, it was contemplated that things should remain as they were, no new trustee being appointed. It is quite true that there is a special power for the parties, if they should think fit, to fill up the number of trustees to the original number, even when they had not been reduced to five. That was a matter left to the discretion of the trustees, but the scope of the deed was that the number might be reduced to five without any new appointment being made. But, when the time was reached at which there should be only five, the number was to be filled up again to the original number. Looking at the scope of the powers in the deed alone, independently of the *Conveyancing Act*, it seems to me that it was not incumbent upon the parties to fill up the number of trustees to the full number, unless the number had been reduced to five, which was not the case here.

It is said that the power in the *Conveyancing Act* applies, and that under that power the number ought to have been filled up. But sub-sect. 3 of sect. 31 expressly provides that, "on an appointment of a new trustee it shall not be obligatory .... to fill up the original number of trustees, where more than two trustees were originally appointed."

Again, it was argued that the general provisions of the model deed shew, that new trustees were intended to be appointed in some other way than by a formal appointment by deed, and reliance was placed on sub-sect. 7 of sect. 31, which says that the section "applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained." Now this model deed did not contemplate a vacancy arising by the absence of a trustee from the *United Kingdom* for a period of twelve calendar months and did not deal with that event; and I cannot find anything in it

which indicates any intention or wish as to what should be done as regards filling up a vacancy in an event which was not in the contemplation of the parties.

Under these circumstances I think that both the objections to the title fail.

Solicitors for Vendors: *Ingle, Cooper, & Holmes.*
Solicitors for Purchaser: *Penley & Grubbe.*

W. L. C.

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[1884. H. 1376.]

Administration of Estate—Devised Real Estate—Liability of Devisee to unsatisfied Debts of Testator—Alienation by Devisee—Marriage Settlement—Married Woman—Separate Estate—Restraint on Anticipation—11 *Geo.* 4 *& 1 Will.* 4, *c.* 47, *ss.* 6, 8 [*Revised Ed. Statutes, vol. vi., pp.* 792, 793]—*Married Women's Property Act*, 1870 (33 *&* 34 *Vict. c.* 93), *s.* 12.

The liability, under the Act 11 Geo. 4 & 1 Will. 4, c. 47, of a devisee of land, who alienates the land, to the unpaid debts of the testator, is such that, on the alienation, the debts become his own debts to the extent of the value of the land alienated.

Consequently, when a woman to whom land had been devised settled it on her marriage, after the passing of the *Married Women's Property Act*, 1870, the first trust being for herself absolutely until the marriage, and, after its solemnization, on trust for herself for her life, without power of anticipation, with remainder on trusts for the issue of the marriage:—

Held, that, the testator's personal estate being insufficient to pay his debts, the life interest of the settlor was, notwithstanding the restraint on anticipation, liable to make good the deficiency, to the extent of the value of the devised land; her liability to satisfy the debts of the testator, which arose on her alienation of the land by the settlement, being a debt "contracted by her before marriage" within the meaning of sect. 12 of the *Married Women's Property Act*, 1870.

Sanger v. *Sanger* (1) and *London and Provincial Bank* v. *Bogle* (2) followed.

FURTHER CONSIDERATION.

James Hedgely was the owner in fee of a farm called *Delameres*, subject to a mortgage thereof to the Plaintiffs to secure £3000 and interest.

(1) Law Rep. 11 Eq. 470. (2) 7 Ch. D. 773.

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By his will, dated the 10th of December, 1859, he appointed his wife and *R. Maskell* and *R. Page* executors and trustees thereof. And he devised *Delameres* farm, together with other hereditaments, to his wife during her widowhood, with remainder to his daughter in fee. And he devised a copyhold farm and lands situate at *Tillingham* to *R. Maskell* and his heirs, upon trust to keep down the interest on the mortgage debt during the life of one *Mary Hedgely*, and subject thereto to pay the rents thereof to his wife during her widowhood, and after her death or remarriage in trust for his daughter in fee. The testator died on the 28th of December, 1859. *Mary Hedgely* died on the 15th of February, 1883.

The testator's daughter, in 1879, married *T. B. Eves.* Previously to the marriage she, by a deed dated the 22nd of July, 1879, in contemplation of the intended marriage, conveyed her interest in the *Delameres Farm*, subject to the mortgage thereof, and her interest in the *Tillingham* property, to trustees, on trust for herself absolutely until the solemnization of the marriage, and afterwards in trust for herself for her life, for her separate use without power of anticipation, with remainder in trust for the issue of the marriage.

The Plaintiffs brought this action against the testator's widow; *Maskell* and *Page*; and the trustees of the daughter's settlement; claiming to have an account taken of what was due to them on their security; an order for payment by the first three Defendants of what should be found due on taking the account, together with the costs of the action; and that, in default of payment, the security might be realized by foreclosure or sale. And, in case the proceeds of sale should be insufficient to satisfy what should be found due to the Plaintiffs, the Plaintiffs further claimed, on behalf of themselves and all other the creditors of the testator, that his real and personal estate might be administered.

The judgment at the trial of the action directed that various accounts and inquiries should be taken and made, and that the *Delameres Farm* should be sold, and, in case the proceeds of sale should be insufficient to satisfy what should be found due to the Plaintiffs, the ordinary administration accounts and inquiries were directed to be taken and made, and, in case the testator's

personal estate should prove insufficient, it was ordered that a sufficient part of his real estate, other than the *Delameres Farm*, or, if necessary, the whole, should be sold to make good the deficiency of his personal estate.

The Chief Clerk by his certificate found that, except the Plaintiffs' mortgage debt and another mortgage debt, there was not any debt of the testator remaining unpaid. The proceeds of the sale of the *Delameres Farm* had been paid into Court.

It was admitted that the proceeds of sale, together with the testator's outstanding personal estate, would not be sufficient to satisfy what was due to the Plaintiffs.

This was the further consideration of the action.

Cozens-Hardy, Q.C., and *Chadwyck-Healey*, for the Plaintiffs:—

By virtue of sects. 6 and 8 of the Act (11 Geo. 4 & 1 Will. 4, c. 47 (1)), the Plaintiffs are entitled to have their debt (so far as the proceeds of the sale of the mortgaged property and the testator's personal estate are insufficient) satisfied out of his other devised real estate. And, admitting that the marriage settlement made by Mrs. *Eves* was a *bonâ fide* alienation, she, upon the making of the settlement, became personally liable for the Plain-

(1) Sect. 2 of the Act makes void devises of land as against creditors of the testator by virtue of any bond, covenant, or other specialty binding his heirs.

Sects. 3 and 4 enables such creditors to sue the heirs of the testator and the devisee jointly, or the devisee solely, in case there shall be no heir.

Sect. 6: "In all cases where any heir-at-law shall be liable to pay the debts or perform the covenants of his ancestors in regard of any lands, tenements, or hereditaments descended to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him, such heir-at-law shall be answerable for such debt or debts, or covenants, in an action or actions of debt or covenant, to the value of the said lands so by him sold, aliened, or made over, in which cases all creditors shall be preferred as in actions against executors and administrators; and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, tenements, and hereditaments, *bonâ fide* aliened before the action brought, shall not be liable to such execution."

Sect. 8: "All and every the devisee and devisees made liable by this Act shall be liable and chargeable in the same manner as the heir-at-law by force of this Act, notwithstanding the lands, tenements, and hereditaments to him or them devised shall be aliened before the action brought."

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tiffs' debt to the value of the devised property, and that liability can be enforced against her life interest under the settlement, the value of which must necessarily be less than that of the whole settled property. The widow's life interest under the will is, of course, also liable to satisfy the Plaintiffs' debt.

By virtue of sect. 12 (1) of the *Married Women's Property Act*, 1870, the separate property of Mrs. *Eves* is liable to satisfy the Plaintiffs' claim, notwithstanding the restraint on anticipation: *Sanger* v. *Sanger* (2); *London and Provincial Bank* v. *Bogle* (3). The liability is a debt "contracted by the wife before marriage" within the meaning of sect. 12, for the testator's debt became the debt of Mrs. *Eves* upon the alienation by her, to the extent of the value of the land devised to her: *Spackman* v. *Timbrell* (4).

Everitt, Q.C., and *W. Barnard*, for the testator's widow and for his executors:—

We do not dispute that the widow's life interest is liable to the Plaintiffs' claim, but she is interested in throwing as large a part as possible of the liability on Mrs. *Eves*' interest. The legal estate in the land is in the trustee, and an alienation of the equitable interest cannot affect the rights of creditors against the land. The Plaintiffs' right is to ignore the settlement altogether, and to have their debt satisfied out of the whole estate; not merely out of the life interests.

[NORTH, J.:—How can I in an action by mortgagees go into equities between the persons beneficially interested in the estate?]

The Plaintiffs are suing as creditors, not as mortgagees. A creditor cannot elect to take his debt out of one interest in the estate.

At any rate, the balance of the Plaintiffs' debt ought to be raised by sale or mortgage of both the life interests.

(1) Sect. 12: "A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts as if she had continued unmarried."

(2) Law Rep. 11 Eq. 470.

(3) 7 Ch. D. 773.

(4) 8 Sim. 253, 259.

Begg, for Mrs. *Eves*, and the trustees of her settlement:—

A marriage settlement is a *bonâ fide* alienation. Notice of the testator's debts is immaterial: *Richardson* v. *Horton* (1). Equitable estates stand for this purpose in the same position as legal estates: *British Mutual Investment Company* v. *Smart* (2). Every interest in the land created by the settlement is equally protected against the claims of the testator's creditors; the "land" means every estate carved out of it: *Dilkes* v. *Broadmead* (3).

[NORTH, J.:—That case was decided before the passing of the *Married Women's Property Act*, 1870.]

Sect 12 of that Act does not apply to this case; it applies only to debts "contracted" by the wife before marriage, *i.e.*, her own debts, which she has herself contracted. Before the settlement was executed Mrs. *Eves* was not personally liable for her father's debt. The land devised to her was liable to be administered in payment of the father's debts, but, before any claim was made by the Plaintiffs, she made a *bonâ fide* alienation of the land. Then the statute says that the devisee who alienates is to become answerable for the debts of the testator to the extent of the value of the devised land. The liability arises after the alienation, and upon the alienation Mrs. *Eves* became a married woman.

[NORTH, J.:—There is a trust for her until the marriage.]

That is not the interest which the Plaintiffs are seeking to impound. When the Act 11 Geo. 4 & 1 Will. 4 was passed a married woman could not have been sued for a debt.

[NORTH, J.:—Before the *Married Women's Property Act*, 1870, a woman on marriage ceased to be liable for her debts previously contracted, and her husband became liable.]

The Act 11 Geo. 4 & 1 Will. 4 does not make the testator's debts the debts of the devisee upon his alienation of the devised land; it only makes him liable for the testator's debts. In *Richardson* v. *Horton* the first life estate under the settlement was given to the husband of the testator's daughter, who made the settlement. In *Spackman* v. *Timbrell* (4) the settlement

(1) 7 Beav. 112.
(2) Law Rep. 10 Ch. 567.
(3) 2 D. F. & J. 566.
(4) 8 Sim. 253.

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was made by the testator's son. In *Sanger* v. *Sanger* (1) and *London and Provincial Bank* v. *Bogle* (2) the debts had been contracted by the wife herself before marriage. Those cases, therefore, do not apply. There is no reported case in which, after a marriage settlement of devised land has been made by the devisee, payment of the testator's debts has been enforced against any of the interests under the settlement.

Cookson, Q.C., and *C. C. Berkeley*, for other parties.

NORTH, J. (after stating the facts, continued) :—

As regards the life interest of the testator's widow, that, of course, is a voluntary gift to her, and she took it subject to the liability to satisfy out of it the debts of the testator. The testator's daughter, Mrs. *Eves*, took an absolute interest in remainder, also subject to the liability of satisfying out of it the testator's debts. By virtue of sects. 6 and 8 of the Act 11 Geo. 4 & 1 Will. 4, c. 47, the *Tillingham* estate was assets in her hands for the payment of her father's mortgage debt, to the extent to which the mortgaged estate and his personal estate were insufficient to satisfy it. While that *Tillingham* estate was assets in her hands she made a *bonâ fide* alienation of it by her marriage settlement. Thereupon, the land ceased to be liable to the testator's debts, and she became personally liable for them, to the extent of the value of the land aliened, as if they were her own debts, in precisely the same way as the land would have been liable if she had not aliened it. By the settlement made before the marriage (which probably took place the next day) she conveyed the land to trustees, upon certain trusts for the benefit of herself and the issue of the intended marriage, the first trust being for herself absolutely until the marriage, and then in trust for herself for her life, for her separate use without power of anticipation. She married in 1879, after the passing of the *Married Women's Property Act*, 1870. If the marriage had taken place before the passing of that Act, the result would have been this, that, after the alienation to the trustees, and so long as she remained a single woman, she would, to the extent of the value of the land

(1) Law Rep. 11 Eq. 470. (2) 7 Ch. D. 773.

conveyed, have been personally liable for the testator's debts, as if they had been her own debts. Upon her marriage she would have ceased to be personally liable for those debts, and her husband would have taken over her liability for them. By the marriage she would have been relieved from the liability, and her husband would have become liable as she had been. Sect. 12 of the *Married Women's Property Act*, 1870, altered this state of things, and the result of it is that during the interval (probably a day) between the execution of the settlement and the celebration of the marriage she was personally liable for the testator's debts, to the extent of the value of the land settled, but, upon the marriage, that liability attached to any separate estate she might have. The fact that she settled the land so as to give herself a life estate to her separate use is wholly immaterial. Her prior personal liability attached on the marriage to any separate estate which she had. The only question is, whether the liability can be enforced against separate estate as to which she is restrained from anticipation. The two cases which have been cited shew that it can. And it would be very unjust if, by settling her own property on herself, with a restraint on anticipation, she could escape from her liability to satisfy the debts of the testator.

There must be a declaration that the widow's life interest is liable to satisfy the unpaid balance of the Plaintiffs' debt, and that Mrs. *Eves* is also liable to the extent of the value of the land aliened by her, and that the liability can be enforced against her life interest under the settlement, notwithstanding the restraint on anticipation. I do not decide anything now as to the rate of contribution between the two life estates.

Solicitors: *Storey & Cowland*; *Clapham & Fitch*; *Berkeley & Calcott.*

W. L. C.

NORTH, J.

1886

Dec. 16.

In re RILEY to STREATFIELD.

[1886 R. 1086.]

Vendor and Purchaser—Conditions of Sale—Interest.

Where there is a condition that the purchaser shall pay interest from the day fixed for completion in case of delay from any cause "except the wilful neglect or default of the vendor," the purchaser cannot relieve himself from the liability to pay interest by setting apart the unpaid purchase-money and giving the vendor notice of such appropriation.

In re Golds and Norton's Contract (1) not followed.

THIS was a vendor's summons to have it declared, among other things, that the representatives of a deceased purchaser were bound to pay interest at the rate of 5 per cent. per annum on the unpaid balance of their purchase-money from the 15th of February, 1886, the date fixed for completion of the purchase, until the actual completion thereof. The condition as to the payment of interest was as follows: "If from any cause whatever, except the wilful neglect or default of the vendors, the completion of the purchase shall be delayed beyond the said 15th day of February next, the purchaser shall pay interest at the rate of £5 per cent. per annum on the balance of his purchase-money from that day until the purchase shall be completed."

On the 16th of February, 1886, the purchaser's solicitors wrote to the vendor's solicitors a letter containing the following words:—"The purchase-money is ready and lying idle at Mr. *Streatfield's* bankers."

On the 2nd of March, 1886, the purchaser's solicitors wrote to the vendor's solicitors as follows:—"Referring to our letter of the 16th ultimo, in which we informed you that the purchase-money was ready and lying idle at Mr. *Streatfield's* bankers, we beg to say that having regard to the further delay likely to arise in consequence of the insufficiency of the power of attorney by Captain *John Leach*, we wish to avert the possibility of any question arising between us as to the purchaser's liability to pay interest on the balance of his purchase-money, and we therefore

(1) 33 W. R. 333.

beg to inform you that he is willing forthwith to deposit such balance in joint names with any first-class *London* banker on deposit pending the due execution of the conveyance to the purchaser, and collateral deeds." The offer was accepted "without prejudice as to any question as to interest."

G. Pemberton Leach, for the vendors.

Napier Higgins, Q.C., and *Bagshawe*, for the representatives of the purchaser:—

Even if the delay did not arise from the wilful default of the vendors, the purchaser, having set apart the unpaid purchase-money, and given notice to the vendors that he had done so, ought not to pay interest. That contention is not inconsistent with the older authorities: *De Visme* v. *De Visme* (1); *Vickers* v. *Hand* (2); *Williams* v. *Glenton* (3); *Denning* v. *Henderson* (4). In *Fry* on Specific Performance (5), the question is considered doubtful. And it is now settled that interest is not payable in such a case: *In re Monckton and Gilzean* (6); *In re Golds and Norton's Contract* (7).

NORTH, J. (after deciding that there was no wilful neglect or default on the part of the vendors so as to relieve the purchaser from payment of interest under the condition, continued):—

But then it is said something happened which ought to relieve him from a liability to pay interest, namely, that the money was in some way appropriated. All that I know about that is what is contained in a letter dated the 16th of February, containing this passage: "The purchase-money is ready and is lying idle at Mr. *Streatfield's* bankers." There is no other evidence of it but that; but I will take for granted the statement in that letter was correct. But the money is not in any way invested, or set apart to a separate account, and it is not even on a deposit account bearing interest. Independently of that, it appears to me, even

(1) 1 Mac. & G. 336.
(2) 26 Beav. 630.
(3) Law Rep. 1 Ch. 200.
(4) 1 De G. & Sm. 689.
(5) 2nd Ed., p. 596.
(6) 27 Ch. D. 555.
(7) 33 W. R. 333.

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if it had been placed to a separate account bearing interest, that this in itself would not have been sufficient to relieve the purchaser from payment of interest, if interest is payable under the contract. For this purpose, of course, I assume that I am right in holding that there was no wilful neglect or default on the part of the vendors. Then it comes simply to this, a contract that the purchaser will pay interest till completion. Why should he be relieved from paying interest, which he has contracted to pay, by the fact that he simply placed the money to his account at his bankers, or even placed it to a separate account, if you please, at the bankers as distinguished from his own account? I do not see how the purchaser can take the matter into his own hands and put an end to this contract to pay interest by anything he does other than by completing the purchase and paying over the principal. But then it is said there are authorities that settle that point. I observe that in the passage which has been quoted to me from the last edition of *Fry* on Specific Performance, the point is put as an open question, "Whether, where there is a condition of this kind, a purchaser can nevertheless exempt himself from the payment of interest by specially investing the purchase-money, and giving the vendor notice that it has been thus appropriated for the purposes of the contract, seems to be at least doubtful." Then the cases of *De Visme* v. *De Visme* (1), *Vickers* v. *Hand* (2), *Williams* v. *Glenton* (3), and *Denning* v. *Henderson* (4) are referred to. As regards *De Visme* v. *De Visme*, it seems to me an important authority on the point, because the case was fully argued and considered, and decided deliberately by Lord *Cottenham*. Circumstances occurred there which would have rendered such argument and judgment unnecessary if the law had been as the purchaser contends it is, namely, that when a purchaser has placed his money to a separate account and given notice to the vendor, from that time, under all circumstances, he is relieved from payment of interest. If that were so, the point argued and decided deliberately in *De Visme* v. *De Visme* could not have arisen. Again, in *Vickers* v. *Hand*, although the money had been set apart to a separate account, yet this was

(1) 1 Mac. & G. 336.
(2) 26 Beav. 630.
(3) Law Rep. 1 Ch. 200; 34 Beav. 528.
(4) 1 De G. & Sm. 689.

not considered in any way to affect the question. In *Denning* v. *Henderson* (1) no doubt there was a reference to the money being carried to a separate account; but in *Williams* v. *Glenton* (2), which is relied on by the purchaser, all I find stated is that, when the matter came before the Master of the Rolls (3) he said: "If he had laid his money by and had given notice of this, the case would have been different; but as he has not done so, the letter of the 20th of June, 1854, cannot vary the right of the purchaser in this respect." When the matter came before the Court of Appeal, Lord Justice *Knight Bruce* made this remark (4): "The purchaser might possibly have exempted himself from interest by investing the purchase-money; he might, and possibly with success, have refused to be bound by the contract; but he did neither." I cannot read that as being a decision that if he had taken a different course he would have escaped liability. It is merely putting the matter on one side as out of consideration. Further it is not said here that there had been any investment of the purchase-money, and the money was not making interest for the person entitled to it, as I think it ought to have been if the purchaser intended to rely upon any appropriation. Looking at it on principle, therefore, it seems to me there is nothing to relieve the purchaser from payment of interest, and these authorities do not help him.

Then there are two other cases cited; the first that of *Monckton and Gilzean* (5). In that case there was a contract containing the provision that if from any cause whatever the purchase should not be completed on a given day, the purchaser was to pay interest at 5 per cent. No objections or requisitions were sent in. There was a provision that the vendors might rescind the contract if any objections, with which they were unwilling to comply, were insisted on. That state of things did not happen at all; but though it did not happen, they professed to exercise the power of rescission contained in that contract. It was decided by the Vice-Chancellor at the trial of the action, that the attempt to rescind was nugatory, and the contract was not

(1) 1 De G. & Sm. 689.
(2) Law Rep. 1 Ch. 200; 34 Beav. 528.
(3) 34 Beav. 534.
(4) Law Rep. 1 Ch. 206.
(5) 27 Ch. D. 555.

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rescinded, and must be completed. Then at the end of the case, after judgment, the counsel for the purchaser asked for a declaration that the purchaser could not be required to pay any interest on the balance of the purchase-money higher than that allowed by the bank at which the balance had been deposited. The point was raised whether the Court had jurisdiction to make such a declaration under the *Vendor and Purchaser Act*, and the Court held it had. But that was a totally different case from the present. It was a case in which the money had actually been deposited on the day fixed for completion, at a time when the vendors' contention was that there was no contract at all. It was, therefore, a question whether interest should be paid on the purchase-money, not during delay in completion, but during the time when there was a repudiation of the contract, and no step was being taken towards completion in any way.

Then another case is relied on which is nearer the present, a recent decision of Mr. Justice *Kay* in *In re Golds and Norton's Contract* (1). There no doubt it appears that the learned Judge considered that if the money had been paid to a deposit account interest would have stopped. That was a decision on the basis of *Kershaw* v. *Kershaw* (2). That was the only case cited, and upon that apparently the learned Judge went. But that was a case in which there was no condition for payment of interest in case of delay from any cause except wilful neglect or default. The condition was simply this—it was very informal—"Amount of purchase-money" so much, "purchase to take effect from 30th June, 1868, and interest at 5 per cent. to time of payment, and timely notice to be given as to requirement of the purchase-money." That was a totally different case. As I say, that is the only authority that was referred to. The question was not discussed before Mr. Justice *Kay* at all. None of the cases that have been referred to before me were cited; and there may have been circumstances in that case which entirely warranted the judgment which was pronounced. It does not seem to me to be an authority upon which I can come to the conclusion that a person who has contracted to pay interest, unless there is wilful default on the part of the vendor, can relieve himself from the

(1) 33 W. R. 333. (2) Law Rep. 9 Eq. 56.

payment of what he has contracted to pay merely by having the money standing ready at his bank to his own account.

Under these circumstances I come to the conclusion that the interest must be paid.

Solicitors for Vendors: *Leach & Deedes.*

Solicitors for Purchaser's Representatives: *Palmer, Eland, & Nettleship.*

D. P.

ASHWORTH *v.* MUNN.

[1870 A. 14.]

Administration of Estate—Mixed Fund of Realty and Personalty for Payment of Debts, &c.—Payment out of Personal Estate—Contribution by Real Estate—Interest.

A testator by his will declared in effect that his debts, legacies, funeral and testamentary expenses, and the costs, charges, and expenses incidental to the execution of the trusts of his will, should be paid rateably out of all his estate, real and personal. In the administration of his estate by the Court, the debts, &c., were paid out of the personalty, but without prejudice to the liability of the realty. On the further consideration of the action:—

Held, that the real estate must make good to the personal estate its rateable proportion of the amount paid out of the personal estate for debts, &c., with interest.

The decree in *Williams* v *Kershaw* (1) followed.

THIS was a suit (commenced by bill in the Court of Chancery in 1870) for the administration of the estate of *John Dawson*, who died in September, 1869.

By his will, dated the 1st of June, 1857, the testator bequeathed various annuities and pecuniary and specific legacies, and he devised and bequeathed his real and leasehold estate to trustees, on trust for sale, and he bequeathed his personal estate to trustees, on trust for sale and conversion. And he directed the investment of the proceeds of the sale and conversion upon certain specified stocks and securities. And he declared that all the trust moneys, stocks, funds, and securities aforesaid, and all other money to be received under the trusts of his will, should

(1) *Seton* on Decrees, 4th Ed. vol. i. p. 590.

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form an aggregate fund, and be held upon the trusts following, viz., upon trust (after payment of his debts, funeral and testamentary expenses, and after paying or providing for the several annuities and legacies thereinbefore by him given, bequeathed, and directed to be paid as aforesaid, and the costs, charges, and expenses incidental to the execution of the trusts of his will) to pay certain charitable legacies, and to pay and divide all the rest, residue, and remainder of the money remaining or coming to the hands of the trustees or trustee for the time being by virtue of the trusts of his will unto and equally between the *Wesleyan Missionary Society*, the *Decayed and Worn-out Ministers' Fund*, belonging to the *Wesleyan Conference*, and the *British and Foreign Bible Society*.

This was the third further consideration of the suit, and Mr. Justice *North* held that the effect of the above stated clause in the will was to make the testator's real and personal estate a mixed fund for the payment of his debts, funeral and testamentary expenses, annuities, legacies, and other costs, charges, and expenses therein mentioned, and that, as the debts and some of the legacies had been in fact paid out of the pure and impure personal estate, the real estate must now make good its rateable proportion of the payments so made. The payments which had been made under the directions of the Court out of personal estate had been expressly made without prejudice to the liability of the real estate.

The question now arose whether the real estate was also bound to pay interest on the amounts which it ought to have contributed at the times when the respective payments of debts, &c. were made.

Cozens-Hardy, Q.C., and *R. F. Norton*, for the Plaintiffs, the testator's co-heiresses :—

No authority is to be found in any reported case for the payment of interest in such a case.

Napier Higgins, Q.C., and *Bunting*, for the two *Wesleyan Societies* :—

There is very little authority for ordering interest to be paid,

but in the decree in *Williams* v. *Kershaw* (1) there is a direction to compute interest on so much of the testator's debts, &c., as ought to have been paid out of the testator's real estate, and that so much of the real estate as would raise the amount which ought to have been paid out of it, with interest, should be sold. No reference, however, is made to this point in the reports of *Williams* v. *Kershaw* (2). In *Roberts* v. *Walker* (3) the decree reserved "the consideration how the proportion to be borne by the real estates, and any and what interest thereon are to be raised." That assumes that interest ought to be paid by the real estate. And on principle interest ought to be paid. A person who discharges an incumbrance on an estate is entitled to stand in the place of the incumbrancer in respect of both principal and interest. That principle applies here, and this Court, in adjusting the rights of the persons who are entitled to a fund, always debits interest upon payments which have been made before the adjustment.

The Plaintiffs have been receiving the income of the real estate, while those who are entitled to the personal estate have been deprived of more than the due proportion of the income of it. The persons who are entitled to the personal estate have in fact made an advance on behalf of the persons entitled to the realty, and that advance ought to be recouped with interest.

Giffard, Q.C., and *Ingle Joyce*, for some of the testator's next of kin (who were entitled to the impure personalty the gift of which to charities had failed):—

There cannot be a complete indemnity without the payment of interest, and we are entitled to a complete indemnity. There is no authority contrary to *Williams* v. *Kershaw*.

Ingle Joyce, for the *Bible Society;* and *B. B. Swan;* and *E. S. Ford*, for other next of kin.

Method, for the trustees of the will.

Cookson, Q.C., and *Woodroffe*, for other parties.

(1) *Seton* on Decrees, 4th Ed. vol. i. p. 590. (2) 1 Keen, 274, n.; 5 L. J. (N.S.), (Ch.) 84.
(3) 1 Russ. & My. 752, 768.

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Cozens-Hardy, in reply :—

The point was not decided in *Roberts* v. *Walker* (1). It was expressly reserved, and not a word is said about it either in the argument or the judgment. The full report of *Williams* v. *Kershaw* (2) does not allude to this point.

The point must be decided on principle, not on authority. The case is not like the payment off of an incumbrance on real estate. It is only for certain purposes that an aggregate fund of realty and personalty was created by the testator. Costs do not carry interest, though debts may. Some of the legacies are not even yet paid. There is no contract to pay interest.

[NORTH, J., referred to *Andrewes* v. *George* (3), *Stewart* v. *Stewart* (4), and *In re Rees* (5), as shewing that children of a testator, who have to bring into hotchpot advances made by him to them during his lifetime, are charged with interest.]

There is no ground on principle for extending those decisions.

NORTH, J. :—

As I construe his will the testator has in effect declared that his debts, legacies, annuities, funeral and testamentary expenses, and the costs of executing the trusts of his will are to be borne rateably out of the whole of his estate. The general personal estate has down to the present time borne all the charges which ought to have been borne rateably by the general personal estate, the specifically bequeathed personal estate, and the real estate, and the amount of the contribution to be made by the last two of these three funds has now to be determined. The only question is whether these two funds ought to be charged with interest upon the principal sums which they are bound to contribute. It appears to me that they ought. One of the three funds has contributed an undue proportion of the charges. There were good reasons for its doing so in the first instance. But now an adjustment of the amount of the contribution is to be made between the three funds, and I think that each of them ought to be placed in

(1) 1 Russ. & My. 752.
(2) 5 L. J. (N.S.) (Ch.) 84.
(3) 3 Sim. 393.
(4) 15 Ch. D. 539.
(5) 17 Ch. D. 701.

the same position as if it had contributed its proper proportion at the time at which it ought to have done so. It seems to me, therefore, that the real estate (for instance) ought now to contribute, not only its proportion of the capital, but also interest thereon from the respective times at which the payments were made. The persons who are entitled to the real estate, if they had contributed to the payment of the debts at the proper time, would not thenceforth have received the income of the capital which they had contributed, as they have in fact done. It seems to me, therefore, that the decree in *Williams* v. *Kershaw* (1) was in the right form. Indeed, I am under the impression that I have seen other decrees in the same form. And my view is confirmed by the practice in the case of children of a testator who have received part of their shares of his estate during his lifetime, and who have to account after his death for what they have received; in such a case they have to account with interest. And the practice is the same in the case of a mortgage of two estates, there being a second mortgage of one of them; if the first mortgagee has received payment of his debt out of the estate which is subject to the second mortgage under circumstances which entitle the second mortgagee to contribution or indemnity, he is entitled to be recouped, not only the capital, but also interest on it from the time at which it was applied by the first mortgagee. I think the practice in those cases applies by analogy to the present.

Solicitors: *Clarke, Woodcock, & Ryland; Walker & Battiscombe; Gregory, Rowcliffes & Co.; Hollams, Son, & Coward; Bolton, Robbins, Busk & Co.; Robinson, Preston, & Stow.*

(1) *Seton* on Decrees, 4th Ed. vol. i. p. 590.

W. L. C.

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1887

Jan. 11.

In re GAULARD & GIBBS' PATENT.

Patent—Petition for Revocation—Trial with vivâ voce Evidence—Patents, Designs, and Trade-marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 26.

A petition for the revocation of a patent having been presented under sect. 26 of the *Patents Act*, 1883:—

Held, that the Respondents were entitled, as they desired it, to have the petition tried with *vivâ voce* evidence.

THIS was a petition (presented under sect. 26 of the *Patents, Designs, and Trade-marks Act*, 1883) for the revocation of a patent, on the ground that the alleged invention was not novel at the date of the patent.

The Attorney-General had authorized the presentation of the petition. The Respondents were the patentee and the assignees of the patent. The Petitioner had delivered particulars of objection.

This was a motion by the Respondents that the petition might be heard with witnesses *vivâ voce*, and that it might be transferred into the list of witness actions.

Aston, Q.C., and *J. C. Graham*, for the motion:—

The petition is in substance an action to try the validity of the patent, and should be tried in the same way as such an action would be tried by *vivâ voce* evidence: *Walker* v. *Hydro-Carbon Syndicate* (1); *In re Haddan's Patent* (2).

Moulton, Q.C., and *L. E. Pyke*, for the Petitioner:—

The ordinary procedure on a petition which is contemplated by sect. 26 (3) of the Act ought not to be altered. At any rate,

(1) 2 Patent Cas. 3.

(2) 2 Patent Cas. 218.

(3) Sect. 26 provides: "(1.) The proceeding by *scire facias* to repeal a patent is hereby abolished.

"(2.) Revocation of a patent may be obtained on petition to the Court.

"(3.) Every ground on which a patent might, at the commencement of this Act, be repealed by *scire facias* shall be available by way of defence to an action of infringement, and shall also be a ground of revocation.

"(4.) A petition for revocation of a patent may be presented by" (*inter alia*) "(b) any person authorized by the Attorney-General in *England*."

the Court should first be satisfied that the Respondents have a *bonâ fide* case. Otherwise, in every case of the kind, the procedure contemplated by the Act will be set aside at the will of the patentee.

NORTH, J.:—

I think the case is one which it would be impossible to try without giving the Respondents, who desire it, an opportunity of calling *vivâ voce* evidence in support of their case. The petition involves precisely the same issues as an action to try the validity of the patent, and it is clear that it ought to be tried on evidence taken in Court. To ask me to require the patentee to state first, on affidavit, the nature of his case, in order that I may see whether the case should be tried on *vivâ voce* evidence, is to ask me to try beforehand by affidavit the very thing which he wants to try on *vivâ voce* evidence. It is in every sense of the word an action, except that it is commenced by a petition instead of by a writ; and I think it ought to be tried in the way in which actions usually are tried, and set down accordingly. The costs of both sides of this application will be costs in the matter.

Solicitors for Respondents: *Campbell, Reeves, & Hooper.*
Solicitor for Petitioner: *A. Curtis-Hayward.*

W. L. C.

STIRLING, J.
1886
July 1, 2, 5, 6, 7.

LADYWELL MINING COMPANY *v.* BROOKES.

[1884 L. 2784.]

LADYWELL MINING COMPANY *v.* HUGGONS.

[1884 L. 3329.]

Principal and Agent—Purchase of Mine by Syndicate—Resale to a Company—Secret Profit—Rescission impossible—Promoter—Liability to account.

On the 1st of February, 1873, four persons (one of whom was a solicitor and conducted the negotiation) purchased a leasehold mine for £5000, with the view of reselling it at a profit to a company to be formed. They completed their purchase on the 17th of March, 1873. On the 4th of April, 1873, they entered into a provisional contract with a trustee for an intended company for the sale of the mine to the company for £18,000 in cash. On the 8th of April, 1873, the company was registered under the *Companies Acts*, and its principal object, as stated in its memorandum of association, was the purchase of the mine, and its articles adopted and ratified the contract of the 4th of April, 1873, and three of the vendors were named in the articles as directors. The whole of the share capital (£30,000) was placed, chiefly by sales in the market, before the incorporation of the company by the vendors, who on the 9th of April paid to the company the whole amount of the share capital. On the same day the shares were allotted in accordance with lists handed in by the vendors, and the vendors were paid their purchase-money of £18,000. The contract of the 1st of February, 1873, was not disclosed to the company. In 1882 the company went into voluntary liquidation, and about May, 1883, the above facts became known to the company. In June, 1883, the company allowed judgment by default to go against them in an action by the lessor to recover possession of the mine. In 1884 the company commenced two actions, one against the executors of two deceased vendors, and the other against the two surviving vendors, to recover the secret profit made by the vendors on their sale to the company, on the ground that they stood in a fiduciary position to the company at the time they bought the mine. It was proved that the memorandum and articles of the company were not prepared by the vendors, and it did not appear by whose instructions they were prepared:—

Held, that as the evidence failed to shew that the vendors, at the time they bought the mine, were promoters of or in a fiduciary position to the company, they were not liable to refund the profit they made on the transaction.

FOR some years prior to January, 1873, the *South Salop Mining Company, Limited*, had worked a lead mine, known as the *Lady-*

well Mine, which they held under a lease from one *J. More*; and, having exhausted their capital, they resolved to sell their interest in the mine and plant. Negotiations were accordingly opened in the month of January, 1873, by Mr. *North*, the chairman of the company, with a Mr. *Palin* (a solicitor) for the sale of the mine, which resulted in an agreement dated the 1st of February, 1873. From the communications between *Palin* and *North* it appeared that *Palin* was acting on behalf of himself and others, and that they contemplated the resale of the mine to a new company to be formed for the purpose of taking over and working it.

The agreement of the 1st of February, 1873, was made between the *South Salop Mining Company, Limited*, of the one part, and Messrs. *Brookes, Palin, Mundey*, and *Waters*, of the other part, and provided for the sale to the four associates of the *Ladywell Mine*, and all the plant, machinery, and effects, for the sum of £5000. It further provided that £500 should be paid down as a deposit, and the balance of the purchase-money on or before the 1st of March, 1873; and that upon payment of the balance of the purchase-money as aforesaid, the company would procure a new lease of the mine to the purchasers or their nominees for twenty-one years.

The deposit was paid immediately on the execution of this agreement, and the balance of the purchase-money was paid on the 17th of March, 1873. These sums were paid by the purchasers out of their own moneys in the proportions in which they were interested in the purchase; and on the 17th of March, 1873, *J. More* demised the *Ladywell Mine* to Messrs. *Brookes, Mundey, Oldrey*, and *Waters*, for twenty-one years from the 1st of January, 1873.

By an agreement dated the 4th of April, 1873, and made between Messrs. *Mundey, Oldrey, Palin, Brookes*, and *Waters*, thereinafter called the vendors, of the one part, and *F. R. Wilson*, as agent for the Plaintiff company, therein called the purchasers, of the other part, it was agreed that the said vendors, according to their respective rights and interests, should sell, and the said purchasers should purchase, the lease of the 17th of March, 1873, and the plant and machinery upon and about the said mining premises, for the sum of £18,000.

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The Plaintiff company was registered on the 8th of April, 1873, under the *Companies Act*, 1862, with limited liability, and with a nominal capital of £30,000 divided into 12,000 shares of £2 10*s.* each. The memorandum of association provided that the objects of the Plaintiff company were (*inter alia*) "to purchase a lease or leases of a mine or mines called or known as the *Ladywell Mine*, situate in the parish of *Shelve*, in the county of *Salop*." The 3rd clause of the articles of association was as follows:—"The agreement dated the 4th of April last, and made and entered into between *R. Palin*, *A. G. Brookes*, *T. C. Mundey*, *R. Oldrey*, and *W. A. Waters*, of the one part, and *F. R. Wilson*, of the other part, is hereby, and all the provisions and contents thereof shall be, and the same is and are hereby ratified, confirmed, and adopted, and the same shall be binding on the company, and all persons now or at any time hereafter becoming members of the company shall be deemed to have had notice of the said agreement and of the provisions and contents thereof, and shall be bound thereby." The articles also provided that the first directors of the Plaintiff company should be Messrs. *Palin*, *Brookes*, *Mundey*, *Oldrey*, and one *W. Græme*. The memorandum and articles of association were signed by *W. Græme* and six other persons, as to whom no evidence was adduced.

On the 9th of April, 1873, the first board meeting of the directors was held, at which all the directors were present, and which was also attended by *Waters*. At this meeting the whole of the share capital was allotted, and lists were produced by *Mundey*, *Brookes*, *Palin*, and *Waters* of the names of persons described in the minutes as persons who had applied for the shares. These lists were for 6000, 1000, 2000, and 3000 shares respectively, and included many names of persons to whom *Mundey* (who was a stockbroker) and some of the other vendors had sold shares in the market before the registration of the company, generally at a premium. The whole of the £30,000 had been paid on or before the same day into the bank of the Plaintiff company by cheques, as follows:—*Mundey*, £15,000 and £7500; *Brookes*, £2500; *Palin*, £5000; and at the same meeting the several vendors received cheques from the Plaintiff company for the £18,000 in proportion to their interests; and on the 2nd

of July, 1873, the lease of the 17th of March, 1873, was duly assigned to the Plaintiff company.

No express notice was given to the Plaintiff company of the agreement of the 1st of February, 1873, or of the amount of the purchase-money therein mentioned.

Mundey died in May, 1875; *Palin* in September, 1877; and *Oldrey* in November, 1880.

The Plaintiff company proved unsuccessful, and in January, 1882, resolutions were passed for a voluntary winding-up, and a liquidator was appointed.

On the 1st of May, 1883, a circular was issued to the shareholders by the then liquidator for (amongst others) the following purposes: That the resignation of the then liquidator be accepted, and that one *Newill* should be appointed in his place; that *Newill*, if and when appointed liquidator, should be authorized to take such proceedings (if any) as he might be advised by counsel to recover from any of the promoters or original directors any profits made by them upon the purchase by the Plaintiff company of the *Ladywell Mine*; that a guarantee fund should be formed; that the mine should be put in working order and sold, and that a committee should be appointed. There was no evidence of what took place at this meeting.

Early in 1883 *J. More* brought an action against the Plaintiff company and against *Brookes*, *Oldrey*, and the executors of the other lessees, to recover possession of the mine and for damages. Judgment for possession went by default against the company, and *J. More* obtained possession of the mine in August, 1883, under an order of the 1st of June, 1883.

In May, 1884, *P. S. Darnell* was appointed the liquidator of the Plaintiff company.

In October, 1884, the Plaintiff company commenced their action against *Brookes* and *Waters*, and shortly afterwards commenced their second action against the executors of *Mundey*, *Oldrey*, and *Palin*.

The statement of claim in the second action alleged that a scheme was arranged between *Mundey*, *Palin*, *Brookes*, and *Waters*, (*a*) that an agreement should be entered into by them for the purchase from the *South Salop Mining Company* of the *Ladywell Mine* for £5000; (*b*) that the Plaintiff company should be formed

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and promoted for the purpose (*inter alia*) of purchasing and acquiring from them the lease of the *Ladywell Mine* and plant, &c., for £18,000; (*c*) that a provisional agreement should be entered into prior to the registration of the Plaintiff company between them and a trustee for the Plaintiff company for the sale of the said lease, or a new lease, and the said plant, &c., to the Plaintiff company at the increased price of £18,000; (*d*) and that *Mundey*, *Palin*, and *Brookes* should be three of the first directors of the Plaintiff company, and should in connection with the other directors adopt and take over on behalf of the company the provisional agreement last mentioned; and that this scheme was carried into effect in manner thereinafter detailed. And the Plaintiff company claimed a declaration that *Mundey*, *Oldrey*, and *Palin* were respectively promoters of the Plaintiff company. 2. A declaration that the adoption and approval by the then directors of the Plaintiff company of the said agreement of the 4th of April, 1873, and the payment out of the assets of the Plaintiff company of the purchase-money of £18,000 were caused by the breach of trust and duty and fraud of *Mundey*, *Oldrey*, and *Palin* as promoters, directors, and agents of the Plaintiff company, and were on their respective parts breaches of trust and duty. 3. That the agreement of the 4th of April, 1873, might be declared not binding upon and might be set aside as against the Plaintiff company, and that the several Defendants might be ordered to pay out of the estates of their respective testators the said purchase-money with interest; or, in the alternative, a declaration that the several Defendants were respectively liable to pay out of the estates of their respective testators any profits made by the latter as such promoters, agents, and trustees in connection with the origin, formation, and promotion of the Plaintiff company, and the payment by the Plaintiff company, or out of the assets thereof, of the said purchase-money of £18,000; that accounts might be taken on the footing of such declaration, and that the several Defendants might be ordered to pay what should be found due in respect of such profits, with interest thereon.

The claim in the first action was substantially to the same effect.

The Defendants in both actions denied the alleged scheme,

and that they or their respective testators were promoters, trustees, or agents for the Plaintiff company as alleged. But the Defendant *Brookes* admitted that at request of *Palin* he agreed to join *Palin* and some other persons in the purchase of the *Ladywell Mine* in the belief that after they had acquired it they would be able to resell it to a company at a considerable profit, and that he was to contribute one-third of *Palin's* share of the purchase-money and to receive one-third of *Palin's* share of the profits.

In the first action a compromise was arranged between the Plaintiff company and *Waters*; and in the second action proceedings were stayed against *Oldrey's* executors.

Both actions now came on for trial against the other Defendants. The correspondence between *North* and *Palin* was put in evidence, also a few letters from *Palin* to *Mundey*, but no letters from *Mundey* to *Palin* were forthcoming. It appeared from this correspondence that the memorandum and articles of association were not prepared by *Palin*, but by a well-known firm of *London* solicitors; but no person concerned in their preparation was called as a witness, nor did it appear by whom the instructions for the memorandum and articles were given. It was proved that an advertisement descriptive of the company had been inserted in the *Mining World* on the 12th and 13th of April, 1873; but such advertisement contained no invitation to the public to subscribe for shares. It also appeared that prior to the registration of the company the whole of the share capital was placed, partly at par and partly by sales at a premium, by *Mundey*, *Palin*, *Brookes*, and *Waters*, except some few shares retained by themselves.

Seward Brice, and *A. N. Cumming*, for the Plaintiff company:—

We do not ask for rescission, as that has become impossible, but we ask for the difference between the buying and selling price, with interest at 4 per cent.

[STIRLING, J.:—Is not the decision in *In re Cape Breton Company* (1) against you?]

(1) 29 Ch. D. 795.

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That case is distinguishable. There the vendor was not a promoter at any time. He purchased for his own benefit, and was not a trustee for the company at the time of the purchase, and two years elapsed between his purchase and the sale to the company; and further, the company, with full knowledge of all the circumstances, elected to abide by the purchase. Here the vendors bought the property with the original intention of forming a company and of selling the property at a profit to a company, and that intention was not only never abandoned but only two months elapsed between the purchase and sale. The vendors, therefore, were promoters from the outset, and stood in a fiduciary relation to the company, and were bound to make the fullest disclosure, which they did not. Some of them were also among the first directors of the company, and therefore trustees for the company, and must refund any secret profit they made. The case is within the principle of *Emma Silver Mining Company* v. *Lewis* (1); *Whaley Bridge Calico Printing Company* v. *Green* (2); *New Sombrero Phosphate Company* v. *Erlanger* (3); *Bagnall* v. *Carlton* (4); *Lydney and Wigpool Iron Ore Company* v. *Bird* (5); *Rawlins* v. *Wickham* (6); *Walsham* v. *Stainton* (7); *Dunne* v. *English* (8); *Redgrave* v. *Hurd* (9); and the company have not lost their right to profits because rescission has become impossible. They never had an opportunity of electing, because they did not become aware of all the circumstances until after the lease had been forfeited: *Great Luxembourg Railway Company* v. *Magnay* (10); *In re Ambrose Lake Tin and Copper Mining Company* (11). Lastly, the liability of these directors is joint and several: *In re Carriage Co-operative Supply Association* (12).

Hemming, Q.C., and *Ingle Joyce*, for the executors of *Mundey*:—

The evidence fails to substantiate the scheme alleged in the statement of claim. Whatever the effect of the correspondence between *Palin* and *North* may be, it is not evidence against us;

(1) 4 C. P. D. 396.
(2) 5 Q. B. D. 109.
(3) 5 Ch. D. 73; 3 App. Cas. 1218.
(4) 6 Ch. D. 371.
(5) 31 Ch. D. 328; 33 Ch. D. 85.
(6) 3 De G. & J. 304.
(7) 1 D. J. & S. 678.
(8) Law Rep. 18 Eq. 524.
(9) 20 Ch. D. 1.
(10) 25 Beav. 586, 595.
(11) 14 Ch. D. 390, 394.
(12) 27 Ch. D. 322.

but, if it were, to buy with an intention of selling to a company hereafter to be formed does not of itself constitute a man a promoter: *Gover's Case* (1); *New Sombrero Phosphate Company* v. *Erlanger* (2). The decision in *In re Cape Breton Company* (3) is directly in point. There are two lines of authority—one where a purchaser at a low price afterwards sells at a higher price to a company, the other where part of the apparent purchase-money does not go to the vendors but to financial agents. The cases we have mentioned govern the first class. The other cases cited against us all belong to the second class, and have nothing to do with a case like the present. We also rely on the laches and acquiescence of the company. The facts were known to the shareholders shortly after the date of the circular of the 1st of May, 1883, and not only were no steps taken until October, 1884, but the company, by allowing the lessor subsequently to recover possession of the mine, have made rescission impossible and put it out of their power to restore the property to the vendors.

Barber, Q.C., and *H. Burton Buckley*, for the executors of *Palin*, adopted the same line of argument.

Grosvenor Woods, for *Brookes*:—

The evidence shews that, in the first instance, four persons entered into a joint adventure and bought for themselves, intending, no doubt, a resale to a company, but that did not create a partnership between them nor make each of them liable for the acts of the other: *Lindley* on Partnership (4), nor constitute them promoters. The Plaintiff company have to shew when the co-adventurers became promoters. That is the important point, and that they have failed to prove. *Palin's* letters are not evidence against *Brookes*; and *Brookes*, although admittedly interested in the arrangement for buying and reselling, was no party whatever to the formation or promotion of the company.

Seward Brice, in reply.

(1) 1 Ch. D. 182.
(2) 5 Ch. D. 73; 3 App. Cas. 1218.
(3) 29 Ch. D. 795.
(4) 3rd Ed. vol. i. p. 264.

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STIRLING, J.:—

These are two actions brought by a company, which is now in liquidation, against the executors of two deceased gentlemen and against a third gentleman who is still living, with the object of making them answerable in some shape or form for what are alleged to have been misfeasances in connection with the formation of the company. The company was formed in the year 1873 under circumstances to which I shall call attention more particularly further on, for the purpose of purchasing a certain mine known as the *Ladywell Mine*. Previously to 1873 the mine had been the property of another company known as the *South Salop Mining Company*. That company in the latter part of the year 1872 and the beginning of 1873 was not in a flourishing condition. The capital had been exhausted, the company had borrowed to a considerable extent, and it was, upon the evidence before me, practically impossible for that company either to get fresh capital or to borrow further money to carry on the mining operations of the company: and the *South Salop Mining Company* were desirous of getting rid of the mine. Under these circumstances, negotiations were opened between Mr. *North*, who was chairman of the *South Salop Mining Company*, and who has been a witness in this action, and Mr. *Palin*, who was at the time a solicitor at *Shrewsbury*, with a view to the purchase of the mine by Mr. *Palin* and certain other persons who were associated with him. From the first Mr. *Palin* stated to Mr. *North*—and this is relied upon by the Plaintiffs—that he was one of three or four gentlemen who were a syndicate who wanted to get a contract and then to form a company. Without going into the question how far that statement of Mr. *Palin* is binding upon any one but himself, I shall take it, for the purpose of my judgment, that it was in contemplation by the gentlemen associated with Mr. *Palin* from the commencement of the negotiations that a company would or might be formed for the purpose of purchasing and working the mine. These negotiations resulted in the agreement of the 1st of February, 1873. [His Lordship read the agreement, and continued:—] That agreement, on the face of it, is an agreement for the purchase of the mine by *Palin*, *Brookes*, *Mundey*, and *Waters*, on their own behalf. Whatever may have been in con-

templation by them as to the formation of a company, there is not a shadow of evidence before me that in any shape or way they were at that time in any such relation to any company thereafter to be formed as would render them liable to account in any such way as trustees or agents are compellable to account in equity in respect of profits improperly obtained. The agreement for the purchase having been entered into by these four gentlemen on their own behalf in this way, it is not immaterial to mention that that agreement was carried out and the purchase-money was paid by them out of their own pockets. That being so, no doubt the Plaintiff company was afterwards formed. The evidence as to the way in which that company was formed is extremely scanty. It was registered on the 8th of April, 1873. The memorandum and articles of association are dated the 7th of April, 1873. The memorandum was signed by seven persons, as to whom we have no information whatever except as to one, Mr. *Græme*, who afterwards became one of the directors; and the memorandum and articles of association were drawn up by a firm of independent solicitors—independent, I say, in this sense, that Mr. *Palin*, who had evidently acted as solicitor for the four gentlemen in the transactions in which they were concerned, did not act as the solicitor in framing these articles of association; but, on the contrary, they purport to have been prepared by a firm of *London* solicitors well known to us, both members of which are still living as far as I know—certainly one is—and they have not been called to give evidence. We have no evidence before us as to who gave the instructions for the preparation of the memorandum and articles of association. [His Lordship then referred to the agreement of the 4th of April, 1873, and to the memorandum and articles of association, and continued:—] Now the Plaintiff company having been formed in this way, the first meeting of directors is held on the 9th of April, 1873. *Mundey*, *Brookes*, *Græme*, *Oldrey*, and *Palin* are present. The registration of the company is reported, the agreement of the 4th of April, 1873, is produced, and the seal of the company is ordered to be affixed thereto. Then the bankers, solicitors, the manager, and the secretary of the company are appointed. Then comes this entry: "The lists of names of persons who had applied for shares

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amounting to 12,000 were produced and allotted as follows." Those were the whole of the shares of the company. The lists referred to are not forthcoming, but apparently they were lists sent in by or on behalf of *Mundey*, *Brookes*, *Palin*, and *Waters*, and these four gentlemen, or some of them, gave cheques to the company for the amounts payable in respect of the shares, which were issued as fully paid up, and they, on the other hand, received from the company cheques for their shares of the purchase-money, £18,000, payable under the agreement of the 4th of April, 1873.

The company being thus launched, carried on business for a considerable time; but, unfortunately, there seems to have occurred, a year or two after its formation, a great depreciation in the value of lead; and that appears to have been the immediate cause of its want of success, and ultimately it was wound up and the liquidation is not yet terminated. I ought to state this before I go further, that in the course of the liquidation, on the 1st of May, 1883, a circular was issued by the then liquidator calling a meeting for the following purposes:—[His Lordship read the circular.] There is no evidence of what passed at that meeting: but this is in evidence. It appears that at that time there was pending an action by the landlord, Mr. *More*, for the recovery of the mine, which was in the possession of the company, and on the 1st of June, 1883, Mr. *Brookes*, and the executors of Mr. *Mundey* and Mr. *Palin*, being defendants to it, as well as the company, judgment was recovered as against the company for the possession of the mine and damages as claimed. Under that judgment the landlord has recovered possession, the lease is at an end, and consequently the property, which passed to the company under the arrangement to which I have already referred, is no longer in their hands. That being so, subsequently, at the very end of the year 1884, these two actions are brought. [His Lordship then stated the claim set out in the statement of facts.] Now, first, as regards the declaration that *Mundey*, *Oldrey*, and *Palin* were promoters of the Plaintiff company. If it were necessary for me to come to a final conclusion upon that question, I confess I should have to address myself to a task which appears to me to be of some difficulty, having

regard to the very scanty evidence which has been supplied as to the mode in which the company was formed. That evidence mainly consists, though not entirely, of letters written by Mr. *Palin*. The correspondence is complete as between Mr. *Palin* and Mr. *North*, but we have no letters from Mr. *Mundey*. What the cause of that may be I do not know: but, so far as it is sought to affect Mr. *Mundey's* estate, also Mr. *Palin's*, it is a one-sided correspondence, and therefore it would have to be looked at and scrutinised with the greatest possible care, and I am not at this moment prepared to say that upon such a scrutiny it would be impossible to pick out as much from the correspondence as might lead to the conclusion that *Palin* and *Mundey* were, at some time or other, promoters. I have not thought it necessary, having regard to what I am now going to state, to come to a final conclusion upon that subject. For the present I assume it could be proved that at some time or other they were promoters of the company. But, certainly, there is no evidence which could lead me to hold that they were promoters on the 1st of February, 1873. In my judgment the authorities of *Gover's Case* (1) and *New Sombrero Phosphate Company* v. *Erlanger* (2), preclude me from coming to any such conclusion. Then assuming that they are to be deemed promoters at a subsequent period, the first thing to be considered is, can the first relief which is sought by the prayer of the claim be given? It appears to me that that is impossible, for the company has submitted to an order by which it is put out of their power to make that restoration which would be the necessary preliminary to their getting relief in the shape of rescission, and, indeed, the case was not seriously argued on that point.

Then comes the other alternative, which is claimed by the third paragraph of the claim. It seeks to make the Defendants liable for profit made by their testators as promoters, agents, and trustees in connection with the origin, formation, and promotion of the Plaintiff company. Under that it is sought to obtain the difference between the £5000, the price at which the four gentlemen I have mentioned bought, and the price at which they sold to the company. But in order to get relief upon that

(1) 1 Ch. D. 182. (2) 5 Ch. D. 73; 3 App. Cas. 1218.

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footing it is necessary, according to *Gover's Case* (1), *New Sombrero Phosphate Company* v. *Erlanger* (2), and the recent case of *In re Cape Breton Company* (3), that the persons seeking relief should be able to carry back the fiduciary relation to a date which would prevent the person standing in that position from making a secret profit, that is, to the time at which the first contract was entered into. But there is no evidence upon which I can come to that conclusion; and therefore, upon the authority of those cases, I cannot make the Defendants liable for any such profit.

Then it is sought in some shape or way, which is not very clearly put, to make them liable for a breach of trust or duty, treating them as standing in a fiduciary position to the company, not on the 1st of February, 1873, but at the time when the company was incorporated. It seems to me that the case of *In re Cape Breton Company* is an authority which is in point against any such relief being given. It is said that it is distinguishable on two grounds. First of all, it is said that in that case the director who was sought to be made liable was not a promoter, and that he bought several years before at a time when he had no fiduciary relation whatever. It seems to me that the mere fact of a person being a promoter cannot materially affect the case, he not being a promoter at the time when the contract of purchase was entered into. Again, it is said that in that case the company, having considered all the facts, deliberately elected not to ask for rescission, but to proceed against the directors for profits. I must say it appears to me that the facts proved in this case come very near to that. The circular to which I have already referred shews that the fact of the possibility of their being able to recover profits against the directors was brought under the notice of the shareholders at the general meeting. There is no suggestion in that circular of any notion of proceeding against the promoters and directors on the footing of rescission; on the contrary, the suggestion is that the mine should be put in working order and sold as a going concern. And then, further, the company allowed judgment very soon after the date of this meeting to go against them, under which the property was recovered by

(1) 1 Ch. D. 182. (2) 5 Ch. D. 73; 3 App. Cas. 1218.
(3) 29 Ch. D. 795.

the landlord, and it is not suggested that in the meantime, or at any time, the company made any communication to these promoters or directors telling them that they intended to take proceedings against them on the footing of rescission, so that they might have an opportunity to intervene and preserve the property for themselves in case such proceedings were instituted. It appears to me that, even in point of fact, the case of *In re Cape Breton Company* (1) is very close to the present, and when one looks at the principles on which it was decided they appear to me to govern it. The judgments of Lord Justices *Cotton* and *Fry* are founded, as it seems to me, on the impossibility of obtaining rescission, not on the particular mode in which that impossibility had arisen, and the judgment of Lord Justice *Cotton* seems to me in point to a large extent. He says (2): "It is material on that part of the case to consider what I have already mentioned—that the company was expressly formed for the purpose (among other things) of acquiring this particular property." That appears to me to be the case here; and in fact, it is not disputed, that the object throughout was to form a company for the purpose of acquiring this particular property. "The directors, therefore, were not acting under a general authority to buy property. If they had been, it might be said that when an agent does not buy, but hands over to his principal property of his own, he has not performed the commission entrusted to him. No authority has been quoted to shew that even in that case a director would be liable to an action by any shareholder for not having performed the duty which was entrusted to him by the company, and in my opinion such an action could not be maintained. There could be no action at law, and it cannot be considered that a contributory can acquire a right to bring in substance such an action, by taking out a summons under sect. 165. Subject to what we might hear in argument, for we have not heard the Respondents on this point, and assuming that the whole circumstances were not in fact known to the board and to the company at the time of the purchase, the company, if so minded, might have set aside this purchase altogether. Where a trustee, purchasing on behalf of his *cestui que trust*, purchases

(1) 29 Ch. D. 795. (2) 29 Ch. D. 802.

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his own estate without disclosing his own interest in it, the *cestui que trust*, when he discovers the fact, may, if he pleases, set aside the contract altogether, but then he must return that which has been purchased. The same rule applies, in the case of a purchase by a director on behalf of a company, of property in which he has any interest: if the company repudiates the contract the property must be returned. In this case a return of the property is impossible after what was done in 1878." Then he adds: "The resolution of the shareholders to sell the property was passed in 1878, and the company having determined to adopt, and not to set aside, this contract of purchase, it is too late now to seek to do so." No doubt, subject to what I have already said, there is a slight difference here. Perhaps the facts do not go quite so far, but this part of the judgment of the Lord Justice is founded on the proposition that the return of the property is impossible. Then after some further discussion he says (1): "How, then, can Mr. *Fenn* be made answerable for what is called the profit, if at the time when he acquired the property he was not trustee for the company, or in any fiduciary position towards the company. In my opinion, if we had to decide the question without any assistance from the opinion of Lord *Cairns*, we ought still to say that Mr. Justice *Pearson* was right. What is really profit made by a trustee? It is the difference between the value of the property at the time of the purchase being made by the company, and the price which the company gave. It is not the difference between the price that the trustee gave when he was in no way a trustee for the company and that which he got from the company. We have not to decide that in no case could a trustee under such circumstances be made answerable for the difference between the price paid by the company and the market value of an article which had some definite market value, and I will not say what I should decide in such a case. Here the property is one for which there is no market price. The only mode of ascertaining what is the value of such a property is to find how much a purchaser will give for it. If we were now to enter into the question what was the value, we should have to do so with the knowledge which has subsequently been acquired of this property, and

(1) 29 Ch. D. 805.

should be making an entirely new bargain between the vendors and the company. The company have, with the knowledge of the facts, determined to hold the property which they only acquired by agreeing to pay a certain price, and although they may have been entitled to set that agreement aside, yet I think that as they, with knowledge of all the facts, elected to retain the property, it would be wrong to require the trustee to hand over to them that money which was the only consideration upon which he agreed to give the property." It appears to me that much of that applies to the present case. Here again we are dealing with a property which has no definite market value, and, having regard to the evidence which was given by Mr. *North*, I am not prepared to say that the £18,000 was a wrong price under the circumstances to give for the property. It was made very clear in the course of the examination of Mr. *North* that this was a mine that contained a substantial amount of ore which, if developed, might have been worked at a profit. The value of a mine to a company which has got no capital may be very much less than the value of the same mine to a company with a large amount of capital at its disposal, by reason of which it can work the mine at a profit. Therefore, it seems to me that that part of the Lord Justice's judgment has also application to this case. Then Lord Justice *Fry* says (1): "This case is not the case of an agent who, after he has accepted the agency, has acquired property, the purchase of which was within the scope of his agency, and then has resold that property to his principal at a larger sum, in which case it is obvious that the principal may say that the original purchase by the agent at a smaller price was a purchase on behalf of the principal." For the reasons I have already given that applies. "Nor is this the case of a man who accepts an agency to buy some article in the market, and then sells to his principal his own goods, in which case it may be that the agent is liable for not performing his agency by purchasing in the market, supposing it was possible for him so to do." Here again the article is not one which can be bought in the market; but was a specific article which this company was formed to purchase. "This case is distinguished from that, by there being a direction

(1) 29 Ch. D. 811.

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to buy a specific property. Nor, again, is this the case of an agent who, by any subsequent acts of his own, has rendered the rescission of the contract by his principal impossible." That I think also applies to this case. I can see no evidence that it is the act of any of these gentlemen which has rendered rescission impossible. It is the act of the shareholders in not taking the proper steps after the 1st of May, 1883, to preserve the property so that they might be able to return it to the agents if they thought proper to adopt rescission. Dealing with this hypothesis his Lordship goes on to say: "I express no opinion whether or no, in that case, the principal would have a right against the agent, notwithstanding the non-rescission of the contract. This is a case in which the agent, before accepting the agency, had an interest in the property, and during the agency sold that property to his principal without disclosing his interest. That in such a case the principal would have a right to rescind there can be no doubt. The option which the principal had, has in this case been exercised by confirming the contract with knowledge of the facts, and the question is whether, after that affirmance, the agent is liable in any sum to his principal. There is no authority which determines this point, and it, therefore, is to be determined upon principle." There is no doubt that Lord Justice *Bowen's* view was different, and if that had been adopted by the majority of the Court of Appeal (as it was not), there might have been a great deal to say in favour of this action. But it appears to me that the principles laid down by the majority of the Court in that case apply to the present case, and consequently that both actions fail, and must be dismissed with costs.

Solicitors for Plaintiff company: *Jackson & Co.*

Solicitors for Defendants, *Huggons* and others, executors of *Mundey: John Holmes & Son.*

Solicitors for Defendants, *Coles* and others, the executors of *Palin: Chester, Mayhew, & Co.*, agents for *Peele & Peele, Shrewsbury.*

Solicitors for Defendant *Brookes: Snell, Son, & Greenip.*

H. L. F.

BANKES *v.* SMALL.

[1886 B. 37.]

KEKEWICH, J.

1887 Jan. 11.

Further Assurance—Tenant in Tail—Base Fee—Future Estate.

On a sale by a tenant in tail in remainder who had disentailed without the concurrence of the tenant for life, the tenant in tail covenanted that he would execute every such disentailing and other assurance for further or more perfectly assuring the premises as the purchaser should reasonably require:—

Held, on the construction of the whole deed, that under this covenant the tenant in tail was bound to execute a disentailing deed after the death of the tenant for life.

Davis v. *Tollemache* (1) observed upon.

UNDER the will of *William Small*, who died in 1821, his son *Martin Small* was tenant for life of a farm at *Shapwick*, in the county of *Dorset*, with remainder to the first and other sons of *Martin Small* successively in tail male.

Martin Small had two sons, *Martin Lambert Small* and *W. P. R. Small*.

By an indenture dated the 20th of October, 1871, and duly enrolled under the *Act for the Abolition of Fines and Recoveries*, it was witnessed that *Martin Lambert Small* granted and released the farm aforesaid (subject to the life estate of the said *Martin Small*) unto *Henry Moore* and his heirs, to the use of the said *Martin Lambert Small* and his heirs, to the intent that the estate tail therein of *Martin Lambert Small* might be converted into a base fee. *Martin Lambert Small* afterwards borrowed money from *W. Green* and others on the security of his interest in the farm. In 1874 *W. R. Bankes* contracted with *Martin Small* and *Martin Lambert Small* for the purchase of the farm for £3000; and the draft of a conveyance by the mortgagees and *M. L. Small* was prepared wherein *Martin Small* was to concur as protector. *Bankes* paid off different charges amounting to £1388, but *Martin Small* refused to execute the deed.

W. Green made further advances to *M. L. Small*, and also lent money to the second son *W. P. R. Small* on the security of his contingent reversion. By an indenture dated the 30th of March,

(1) 2 Jur. (N.S.) 1181.

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1875, and made between *W. Green* of the first part, *Martin Lambert Small* of the second part, *W. P. R. Small* of the third part, and *W. R. Bankes* of the fourth part, after reciting that *M. L. Small* and *W. P. R. Small* had agreed with *W. R. Bankes* to sell to him for the sum of £2200 all the estates and interests, rights and titles whatsoever of them the said *W. L. Small* and *W. P. R. Small* under the will aforesaid of and in the farm at *Shapwick*, it was witnesed that in consideration of the sum of £2200 paid as therein mentioned *W. Green* granted, and they the said *M. L. Small* and *W. P. R. Small*, as to all their estates and interests, rights and titles, under the above-mentioned will in the said farm granted all that the farm at *Shapwick* with its appurtenances unto *W. R. Bankes*, his heirs and assigns, to the use of *W. R. Bankes*, his heirs and assigns. And the said *Martin L. Small* and *W. P. R. Small* did for themselves, their heirs and assigns, and each of them for himself his heirs and assigns, covenant with *Bankes* that they, *M. L. Small* and *W. P. R. Small*, then had power to grant the estates, interests and premises thereby granted unto and to the use of *Bankes*, his heirs and assigns in manner aforesaid. "And, further, that they the said *M. L. Small* and *W. P. R. Small* and every person having or claiming any estate, right, title, or interest in or to the said premises or any of them through or in trust for them, or either of them, will at all times at the costs of the said *W. R. Bankes*, his heirs or assigns, execute every such disentailing and other assurance, and do every such thing for the further or more perfectly assuring all or any of the said premises to the use of the said *W. R. Bankes*, his heirs or assigns, as by the said *W. R. Bankes*, his heirs or assigns, shall be reasonably required."

Martin Small, the father, died in 1884, and *W. R. Bankes* then requested *Martin Lambert Small* to execute a disentailing deed which would convert the base fee into a fee simple.

Martin Lambert Small refused, and *Bankes* then brought this action praying specific performance of the covenant for further assurance, and that *M. L. Small* might be ordered to execute a disentailing deed.

Barber, Q.C., and *Rawlinson*, for the Plaintiff:—

The Defendant sold all his interest, and is now bound to do all

that is necessary to give us what he could not give at the time. To what else can the word "disentailing," which is added to the usual covenant, refer but to the deed to be executed when the vendor came into possession? *Davis* v. *Tollemache* (1) is a very peculiar case, and is observed upon in *Sugden* on Vendors and Purchasers (2). In *Edwards* v. *Applebee* (3), and *Pye* v. *Daubuz* (4), the covenant was in general terms.

Warmington, Q.C., and *Russell Roberts*, for the Defendant:—

The covenant for further assurance means merely that any defect in title shall be cured, not that the purchaser shall have more than was included in the deed, and it does not refer to an after-acquired estate. The concurrence of *W. P. R. Small* does not shew any intent for the conveyance of more. What the Plaintiff now wants to obtain is not any estate or interest of the Defendant, but those of some one else. The covenant for title does not extend to anything more than the base fee and shews the intention and extent of the conveyance.

[KEKEWICH, J.:—The vendors could not covenant for more than they had.]

The vendors meant to sell only their base fee, and the deed extends to nothing else. If anything more was meant why was it not expressed, as the parties all knew the state of the title. There is no case in which a covenant for title has been held to extend to a future interest devolving on the vendor. Did any purchaser ever depend on a mere covenant for further assurance when he knew that another disentailing deed was necessary to give him what he had bought? The word "disentailing" may refer to any defect in the first deed, or to the estate of *W. P. R. Small*. The deed carefully deals with the base fee only, and must not be extended. It would be very different in form if it was intended to convey the right to the fee simple. The Plaintiff asks for something which cannot be reasonably required. A power to cut off the estate of others is not an estate or interest. By 3 & 4 Wm. 4, c. 74, s. 22, the protector is empowered to concur though he had no longer any interest, but no such power

(1) 2 Jur. (N.S.) 1181.
(2) 14th Ed. p. 468.
(3) 2 Bro. C. C. 652, n.
(4) 3 Bro. C. C. 595.

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is given to a tenant in tail. Sect. 19 does not apply as there is no estate vested.

KEKEWICH, J.:—

I will not trouble you, Mr. *Barber*, as I have come to a distinct conclusion in this case. I quite admit the force of the Defendant's argument that in order to construe the covenant for further assurance you must look at the whole deed. You must not take simply the words in the covenant and look at them standing alone, but you must look at the whole deed. The Defendant's contention is that looking at the whole deed you ought to come to the conclusion that such a disentailing assurance as is now in question is not an assurance which was pointed at by that covenant. I, on the other hand, have come to the conclusion that it is the very thing which was in the contemplation of the parties—not perhaps the only thing, but at least one thing which was in the contemplation of the parties, and the more you look into the deed the more you see that such was the intention.

It appears that at the date of the deed this property, which was held under the will of one *William Small*, had been the subject of several dealings. *Martin Lambert Small* was the first tenant in tail, but he was not tenant in tail in possession. *Martin Small*, the father was tenant in tail in possession, and *Martin Small*, the father, and *Martin Lambert Small*, the tenant in tail expectant on the determination of his life estate, had in April, 1874, agreed (I pass over the mortgages as being of no importance), with the present Plaintiff, that they would sell to him absolutely the fee simple in this particular property, for £3000. Now *Martin Small*, for reasons which do not appear, declined to execute the proper deeds prepared for the purpose—deeds to which, be it observed, the next tenant in tail was not a party. He would not be a necessary or a proper party, and he was not in fact a party. *Martin Small* declined to execute those deeds; the consequence of which was that both parties were put, no doubt, in a position of some little difficulty. The difficulty was avoided in this way. Mr. *Bankes*, who was not bound, as I read the contract recited here, to do anything of the kind, but perhaps thinking it would

be the right thing to do and that he might thereby ultimately get the estate which he had contracted to purchase, paid off the mortgages, so that *Martin Lambert Small* having created a base fee, Mr. *Bankes* was able to get that estate clear of incumbrances.

Accordingly, in 1875, the contract thus entered into is recited in the deed in this way: "And whereas the said *Martin Lambert Small* and *W. P. R. Small*," who was there introduced as a contracting party for the first time, "have lately contracted and agreed with the said *W. R. Bankes* to sell him for the sum of £2200 all the estates and interests, rights and titles whatsoever of them the said *Martin Lambert Small* and *W. P. R. Small*, under the said will of the said testator *William Small*, of and in the said farm, land, and hereditaments at *Shapwick*." There is no recital there that they had agreed, either or both of them, to disentail the property when they could, that is to say, to acquire an absolute fee simple, and if that recital stood alone it might, particularly having regard to the case of *Davis* v. *Tollemache* (1), be going too far to say that that was a recital of a contract to sell an estate absolutely in fee simple. But the point of it is this, that they, knowing what had gone before, and knowing that *Martin Small* was still alive, contracted there to sell this property, and the property is accordingly sold and conveyed on the terms of the mortgages existing being paid off out of the purchase-money, and one of the mortgages paid off was a mortgage created by *W. P. R. Small*, who was tenant in tail in remainder, and who had incumbered his estate in remainder, and whose concurrence in the contract and the conveyance was purchased in that way. Then they all conveyed according to their estates and interests, and of course they only conveyed the base fee. They could not do anything more, because *Martin Small*, the father, the protector of the settlement, was still alive. But they conveyed what they could, and then they entered into a peculiar covenant. They entered into a joint and several covenant, in the ordinary way no doubt, as to power "to grant the estates, interests, and premises hereby granted or expressed or intended so to be unto and to the use of the said *W. R. B.*"

(1) 2 Jur. (N.S.) 1181.

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in manner aforesaid. Of course they only covenanted that they had a title to convey that which they had conveyed, but when they come to the covenant for further assurance they go beyond the ordinary form, and covenant to execute "every such disentailing and other assurance." Now, for what possible purpose could that word have been put in. Perhaps they reflected that Mr. *Bankes* had lost an estate which he had contracted to purchase. Perhaps they wished for the honour of their father to see that the estate was ultimately conveyed in a proper way. But whether it was that, or whether it really was a thing discussed at the time, they certainly did covenant to execute a disentailing assurance, and under the circumstances there was no other disentailing assurance which *Martin Lambert Small* could execute but a disentailing assurance enlarging his base fee into an absolute fee simple, and of course for the benefit of the purchaser, because he could not do it for his own benefit.

But I am asked to read the covenant as if it applied only to *W. P. R. Small.* Now he could at that time have created, no doubt, a base fee in remainder, and that is all that he could have done, and *Martin Lambert Small* could at that time do nothing more, because he had already created a base fee and the protector of the settlement was still alive. It therefore must, as I read the recitals in the deed, have been intended by that covenant that when the opportunity arose, and when a disentailing assurance could be properly executed, which would be on the death of *Martin Small,* the tenant for life and the protector of the settlement, then if they were both alive and were called upon to do it, or either of them, if only one of those in existence had been called upon to do it, they or either of them would execute a proper disentailing assurance for enlarging the base fee into a fee simple. It appears to me that that is according to the honesty of the case and according to the plain construction of the deed, and I do not see any words in it to limit the meaning or to give it a different meaning from that which I have attributed to it.

Then it is said that I am prevented from so holding by one authority, and one authority only, namely, the case of *Davis* v. *Tollemache* (1). I do not propose to refer to the criticisms on that

(1) 2 Jur. (N.S.) 1181.

case in the text-books, but to deal with the case simply to shew that at any rate it does not prevent me from coming to the conclusion at which I have arrived. It was, no doubt, a case on the construction of a covenant for further assurance, which the Defendant's counsel, ingeniously and necessarily for the support of their case, have argued this to be, instead of being a covenant for the execution of a disentailing assurance. The covenant, there, was a covenant in a mortgage deed, and a covenant in a mortgage deed of course has always a very much larger scope than a covenant in a purchase deed; and the Defendant is entitled to the benefit of whatever virtue that gives to the argument on his behalf. But the Vice-Chancellor held that a covenant in a mortgage deed for further assurance, even in those wide terms, was not sufficient to enable the covenantee to claim the execution of a disentailing deed. If this were a similar case I might or might not be bound to follow *Davis* v. *Tollemache* (1); but this is not a similar case, and Vice-Chancellor *Stuart* points out the difference in the most distinct manner. He says (2): "I cannot find, upon the best attention I can give to the terms of this contract, that anything like a disentailing deed, or anything to bar or affect the interest of any other person, or anything other than what would pass by the simple grant of the grantor to the extent of his own interest, was sought to be effected. The power given to the disentailing act is a power of an entirely different kind. It is a power which gives to a tenant in tail, who intends and wishes to do so, a power to disinherit the issue in tail—to deprive them of that which, according to the terms of the gift, they are entitled to, and to enlarge his estate to a fee simple. I can find no contract in this deed for enlarging the estate of the grantor to any extent." He distinguishes between the ordinary covenant in a mortgage deed for further assurance and a covenant which he did not find there to execute a disentailing deed, and then he says: "If there had been in this deed a specific covenant for the suffering of a recovery or levying a fine, I am by no means prepared to say, that upon the construction of this 64th section of the *Fines and Recoveries Act*, it is not possible that at law the bankrupt might have been liable for damages for non-

(1) 2 Jur. (N.S.) 1181. (2) 2 Jur. (N.S.) 1185.

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performance of that covenant. But my impression is, that the right to recover upon a covenant expressly to execute a disentailing deed, and a right to recover damages for the non-execution of a disentailing deed" (in the report it is "entailing" but it should be "disentailing"), "such non-execution being averred as a breach of the covenant for further assurance, are entirely different things." They are to my mind entirely different things. Therefore I do not find that case in my way, and on the construction of this deed I hold that the Plaintiff is entitled to have a disentailing assurance executed by the Defendant. Being entitled to have a disentailing assurance executed by the Defendant there can be, to my mind, no question but that the Defendant has been reasonably required to enter into one. The Plaintiff might have joined the other party to the covenant in the action, but he is content to take it in that way, and no doubt, as I understand the Act, he will get all he wants if he has a disentailing assurance properly executed by *Martin Lambert Small* and enrolled.

I do not think it necessary to make any further remarks on the *Fines and Recoveries Act*, or any of the sections which have been criticised, except to say that it does seem to me that such a deed as the Plaintiff calls upon the Defendant to execute will perfect his title, and is such as he can reasonably ask to have executed.

I must, therefore, declare that on the true construction of the deed the Plaintiff is entitled to have a disentailing assurance executed by the Defendant, and I must refer it to Chambers to settle a proper deed unless the parties can agree upon one. I must also order the Defendant to execute the deed when settled in Chambers within a reasonable time afterwards. The costs of the action will be paid by the Defendant, who has failed.

Solicitors for Plaintiff: *Lovell, Son, & Pitfield*, for *Rawlins & Rawlins, Wimborne.*

Solicitors for Defendant: *Prior, Church, & Co.*

C. M.

C. A.
1885
CHITTY, J.
Nov. 4.
C. A.
1886
Nov. 19.

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[1885 S. 4432.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 7, *s.* 58, *sub-s.* 1, *division* 6—*Person having the Powers of Tenant for Life.*

A testator, who died in 1884, by his will, made in 1874, devised his residuary real estate to trustees upon trust, during the period of twenty years after his death, out of the rents to manage and superintend his real estate, and improve the same, and to accumulate or invest in the purchase of land the unapplied part of the rents, and after the determination of the said term of twenty years to settle and assure the devised and purchased real estate to the uses and upon the trusts of an existing settlement under which the testator's son took certain estates as tenant for life :—

Held (affirming the decision of *Chitty*, J.), that the testator's son, not having any estate or interest in possession until the determination of the term, had not during its continuance, the powers of a tenant for life under the *Settled Land Act* with respect to the hereditaments devised by the will.

BY an indenture of settlement dated the 20th of March, 1874, certain hereditaments at *Shapwick*, in the county of *Somerset*, were conveyed by *Henry Bull Strangways* (the testator in this action) and his son, the Defendant *Henry Bull Templer Strangways*, to trustees to uses under which, after the death of *Henry Bull Strangways*, the said Defendant became tenant for life. And the trustees were empowered to sell or exchange the settled lands, and directed (subject to a discretionary power to pay off incumbrances thereout) to invest the moneys payable on such sale or exchange in the purchase of other hereditaments, and to settle and assure the hereditaments so purchased or received in exchange to the same uses and trusts as were declared in the settlement concerning the hereditaments thereby settled, and until such investment the moneys arising from sale or exchange were directed to be invested in Government or real securities, and the dividends paid to the persons and for the purposes to whom and for which the rents and profits of the hereditaments when purchased would from time to time be payable and applicable.

Henry Bull Strangways, by his will, dated the 27th of April, 1874, after making certain specific devises and bequests, devised

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and bequeathed all the residue of his real and personal estate to trustees, their heirs, executors, administrators, and assigns, upon trust to convert the residuary personal estate, and out of the proceeds thereof, and also out of the rents and profits of his residuary real estate (if the proceeds of his personal estate were not sufficient) to pay his debts and legacies, and after payment thereof upon trust out of the income of the residue, if any, of his residuary personal estate, and out of the rents and profits of his residuary real estate, to pay to each of his two sisters an annuity of £20 during the period of twenty years from his death if they should respectively so long live. And the testator then declared: "That, subject as aforesaid, my said trustees and trustee for the time being shall stand possessed of and interested in my said residuary real and personal estate during the period of twenty years from and after my decease, upon trust out of the rents and income thereof respectively to manage or superintend the management of my said residuary real estate, and to cut timber and underwood from time to time in the usual course for sale or repair or otherwise, and erect, pull down, or repair houses or other buildings, and drain or otherwise improve all or any of the said premises, and insure houses, buildings, and other property against loss or damage by fire, and make allowances to and arrangements with tenants and others, and accept surrenders of tenancies and leases, and generally deal with the premises as they or he might do if they or he were beneficial owners or owner thereof, without being responsible for any loss or damage which may happen thereby." And after empowering his trustees, out of the said rents and profits, to assist his son in restoring the mansion-house at *Shapwick*, and in the drainage of the estates comprised in the settlement of March, 1874; and declaring that his trustees should after the expiration of the said term of twenty years from his death, and in the meantime subject to the trusts of his will, stand possessed of the surplus, if any, of his residuary personal estate and the income thereof upon the trusts and with the powers contained in the settlement of the 20th of March, 1874, concerning the moneys produced by sale under the power of sale and exchange therein contained; and also declaring that the income of his residuary personal estate until laid out in the purchase

of land, and also the rents and profits of his said real estates, or so much thereof respectively as should not from time to time be applied as thereinbefore provided, should be, during the said period of twenty years, from time to time invested, so that the same might accumulate by way of compound interest, or in the purchase of real estate in *England* convenient to be held with his residuary real estate thereby devised, the testator proceeded as follows: "And I hereby declare that in the event of the purchase of real estate as aforesaid my said trustees or trustee for the time being shall during the said term of twenty years have all the same powers as to letting, leasing, selling, and exchanging the said hereditaments as are in the said settlement of the 20th of March, 1874, contained with reference to the estates hereby settled: And I declare that from and after the determination of the said term of twenty years my trustees or trustee for the time being shall settle and assure my said residuary real estate and all hereditaments which shall have been purchased or received in exchange, or cause the same to be settled and assured, and shall stand possessed of all moneys or stocks, funds or securities which shall not have been and shall then be liable to be laid out in the purchase of land, To such and the same uses, upon such and the same trusts, and for such and the same intents and purposes, and with, under, and subject to the same powers, provisions, conditions, restrictions, and agreements as are in and by the last mentioned indenture of settlement limited, declared, and contained, and shall then be subsisting or capable of taking effect of and concerning the hereditaments and premises thereby settled, and the moneys to be produced by sale thereof, or as near thereto as the deaths of parties and other intervening matters and circumstances will admit, but so as not to increase or multiply charges or powers of jointuring or charging."

The testator died on the 9th of April, 1884, and in May, 1885, an originating summons was taken out by the executors and trustees of his will for the purpose (*inter alia*) of having it decided whether the Defendant, *H. B. T. Strangways*, was tenant for life or had the powers of a tenant for life under the *Settled Land Act*, 1882, of or with respect to the land settled by the testator's will.

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The summons was heard by *Chitty*, J., on the 4th of November, 1885.

Romer, Q.C., and *G. Henderson*, for the trustees and executors.

Macnaghten, Q.C., and *Ingle Joyce*, for *H. B. T. Strangways*.

Ince, Q.C., and *Hull*, for certain remaindermen.

H. J. Hood, for other remaindermen.

CHITTY, J.:—

The question in this case is whether Mr. *H. B. T. Strangways* has the powers of a tenant for life under the *Settled Land Act* with reference to the testator's property, and with reference to any property which may be purchased under the trusts of his will. The trust is a valid trust for twenty years, and includes the whole of the income of the testator's property, and turns it into a capital sum to be laid out in land at the end of that period. Under the trusts referentially declared by the will Mr. *H. B. T. Strangways* is at the expiration of the twenty years tenant for life in possession; that is to say, he will be at the end of twenty years tenant for life in possession of the estates which belonged originally to the testator, and were devised by his will. Now he has no estate or interest in possession, and the commencement of the 58th section of the *Settled Land Act* shews that the powers of the tenant for life under the Act are conferred only on a person who is a tenant for life whose interest is in possession, and that is the qualification which runs through the whole of the 58th section.

The question would not, I think, be susceptible of any argument whatever were it not for certain words which are inserted at the end of division 6 of sub-sect. 1 of sect. 58. That division (6) is as follows:—"A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life . . . . or is subject to a trust for accumulation of income for payment of debts or other purpose." Is Mr. *Strangways* a person who is tenant for life, his estate being in possession subject to trusts for accumulation? I am of

opinion that he is not. There are cases in which a man is made tenant for life, and there is some trust inserted for accumulation which, in substance, when looked at, is a mere incumbrance; and it may be that the testator's will and settlement are so framed that he has made the person tenant for life or one who is to be taken to be tenant for life under the provisions of the Act. This section shews that a trust as against him for accumulation will not deprive him of the powers. But it is quite a different thing with a person who is not a tenant for life at all, and who is not tenant for life in possession. He is only a person who is made tenant for life by the settlement; and to my mind, whatever may be the force of the words, "trusts for accumulation of income for payment of debts or other purpose," those words have no application to the case now before me. This trust during the twenty years is not an incumbrance, and is not within the 7th subsection of sect. 2, because it cannot be redeemed in any way. It cannot be got rid of. It is a valid trust according to the law as it now stands, and the section which says that an incumbrance on the property in settlement, or an incumbrance created by the tenant for life himself on his estate and interest in the land, is not to deprive him of the rights conferred upon the tenant for life generally under the Act, has no application to the case before me.

Something has been said about this being a narrow construction to put upon the Act. I can only say that I never attempt to put upon an Act of Parliament a narrow construction, and certainly I have never attempted to put a narrow construction on this Act.

F. G. A. W.

C. A.

From this decision Mr. *H. B. T. Strangways* appealed. The appeal was heard on the 19th of November, 1886.

Cookson, Q.C., and *Ingle Joyce*, for the Appellant:—

The Appellant is tenant for life of the real estate devised by the will of the testator subject only to the term of twenty years vested in the trustees for the purposes of management, improvement, and accumulation. The case, therefore, falls within the last clause of sect. 58, sub-sect. 1, division 6, of the *Settled Land Act*, 1882, by which it is enacted that amongst the persons who

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are to have the powers of a tenant for life under the Act shall be included a tenant for life whose estate "is subject to a trust for accumulation of income for payment of debts or other purpose." It must be observed that the words are not any "like purpose," but any "other purpose," which is an expression of the widest possible character. This contention is strengthened by sect. 2, sub-sect. 7, which, read with sub-sect. 5, enacts that a person benefically entitled to possession of settled estates for his life is to be deemed to be tenant for life, notwithstanding that his estate "is incumbered or charged in any manner or to any extent;" so that he may be tenant for life although he is not in actual receipt of any rents whatever. And thus the expression at the commencement of sub-sect. 1 of sect. 58: "Each person as follows shall, when the estate or interest of each of them is in possession," have the powers of a tenant for life, cannot be construed as meaning actual beneficial possession or receipt of the rents and profits, but must be read together with the other provisions of this Act.

[They referred to *Egerton* v. *Earl Brownlow* (1), and *In re Jones* (2).]

Ince, Q.C., and *Hull*, for three of the remaindermen:—

The question is not one of possession only. The Appellant takes under the will no interest whatever of any kind until the termination of the term of twenty years. His interest is purely reversionary. In equity the possession of land may be postponed, whatever is the case at law. The last clause of sect. 58, sub-sect. 1, division 6, of the *Settled Land Act*, on which the Appellant relies, must be read together with the qualification in the first clause of sub-sect. 1, that each of the persons thereinafter mentioned is only to have the powers of a tenant for life "when the estate or interest of each of them is in possession." Again, the Appellant is not tenant for life subject to the term, for his interest does not commence until after the determination of the term, and the term can only determine by expiration of time. Moreover, some of the property comprised in the devise will not be in existence until the end of the twenty years, *i.e.*, that which must

(1) 4 H. L. C. 1, 210. (2) 26 Ch. D. 736, 744.

be purchased with the accumulation of the income, so that if the Appellant does not survive the term he never will have an estate in possession in this property.

Cookson, in reply :—

The policy of the Act requires that there must always be some one having the powers of a tenant for life: sect. 51; *In re Clitheroe Estate* (1).

George Henderson, for the trustees and executors.

H. J. Hood, appeared for other remaindermen, but not having appealed the Court declined to hear him.

COTTON, L.J. :—

This is an appeal from an order of Mr. Justice *Chitty* declaring that the present Appellant is not, during the period of twenty years next after the testator's decease, entitled to exercise the powers given to a tenant for life by the *Settled Land Act*, 1882, with respect to the land settled by the will of the testator. It is not contended that he is tenant for life under the definition given by sect. 2, sub-sect. 5 of the Act, but it is said he is a person who has the powers of a tenant for life within the meaning of sect. 58.

The first sub-section of that section enacts as follows: "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act." Now, these persons are persons to be ascertained from the following divisions, but all of them must be able to say, if they are to have the powers of the Act, that their estate or interest is in possession. Of course, if there is anything in the subsequent divisions which not only defines the persons, but alters the ordinary sense of the words "an estate in possession," it must have effect given to it.

Division 6 of sub-sect. 1 is, passing over the words which do not apply to the present case, as follows: "A tenant for his own

(1) 31 Ch. D. 135.

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or any other life . . . . whose estate . . . . is subject to a trust for accumulation of income for payment of debts or other purpose;" and it is said on behalf of the Appellant that these last words prevent the difficulty arising in the present case which Mr. Justice *Chitty* has held to be fatal to the application. Is that so? One must first look to see what has already been decided as regards tenants for life under this Act. To my mind sub-sect. 7 of sect. 2 very much shews what the line is on which the Courts have gone. That sub-section provides that "a person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent." Mere charges existing "under the settlement or otherwise" may not prevent a man who is tenant for life under the settlement from being tenant for life in possession. Why? Because a tenant for life whose estate is in immediate possession always has an interest where there are only charges either on his life estate, or on the property in which he has a life interest. He has the equity of redemption, a present immediate right to pay off those charges and then claim the possession of the estate—the rents and profits of the estate. The Court does not go into the question whether in fact the income of the estate is sufficient to provide for charges upon it. He has an interest for life and a present interest which enables him, if he pays off those charges, to have possession of the estate, and without doing that, he has a right to have such income, if any, as may arise from the estate after providing for the charges; and he has an estate and interest, and that he has in possession.

But is that the case here?

Now in the first place what is charged here must necessarily appropriate for twenty years the entire rents and profits of this estate. So that here the person claiming to be tenant for life in possession, or to exercise the powers of a tenant for life in possession, can have no right during that period to put himself in possession of the estate, or to claim any part of the rents and profits of the estate, however large they may be. But then is that covered by these words "whose estate . . . is subject to a

trust for accumulation of income for payment of debts or other purpose?" It is said that that meets the difficulty, and that without that he could not exercise the powers of a tenant for life. Now we must look at the words "is subject to a trust for accumulation." In my opinion in order to bring himself within that, he must shew that he has an immediate estate—a present estate for life, but that present estate is only subject to a trust for accumution. That is a very different thing from there being a disposition of the entire rent for a given period, and a postponement until the expiration of that period of any interest whatever in the tenant for life. Here, treating him in popular language as future tenant for life, what could he do during twenty years. He could not say, "Hand over the rents to me, and I will provide for the direction to accumulate." No; there is a direction to take all the rents, and apply them for a particular purpose during twenty years. His interest, therefore, is not to arise till after the twenty years, and he has no right whatever to interfere with the present income or rent of the land. It is said by Mr. *Cookson* that there must be an equitable tenant for life of the freeholds. He produced no authority in support of that proposition; and here the legal estate is vested in trustees with a trust which exhausts the whole of the beneficial interest during twenty years. Those trustees have the legal estate in them, subject to certain duties as to the rents which shall arise from the property, and the tenant for life has, during that period, no interest whatever—no estate whatever. He can, it is true, come to a Court of Equity, if the trustees are misapplying the estate, or dealing with it in such a way as to prevent its coming to him, and say, "I have an interest in this, though it is a future interest, and as interested in the accumulations I have a right to come to the Court to compel the trustees to do their duty." But that does not make his estate or interest in the land an estate or interest in possession; although it may give him a right to come to the Court and ask the Court to see that the trustees, who have the entirety of the estate during twenty years, do their duty. In my opinion this case, where the trusts must exhaust all the beneficial income of the land during the next twenty years, is not within the 6th division of sub-section 1 of the 58th section.

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Then the authorities cited have not, in any way, supported the contention of Mr. *Cookson*. *In re Jones* (1) was a case where the income of the tenant for life was, in fact, entirely exhausted by the previous charges under the settlement. There it was held that you must not look to see what the actual amount of the income is, but you must look at the settlement; and in that case, the settlement, although it imposed charges on the estate previous to the tenancy for life, did give an immediate estate for life to Colonel *Grey*, whose interest was then in possession, and who was entitled, subject to the trusts of the term to secure the charges, to the income should there be any. *In re Clitheroe Estate* (2) was really the same thing, and the principle of Sir *James Hannen's* judgment is to be found at page 140. He quotes first of all from Lord Justice *Lindley's* judgment: *In re Jones*: "When we look further into the Act it seems obvious that a term of years, whatever its length be, when it is merely a security for charges, is not such an interest as prevents the person entitled to the income subject to that charge, from being in possession, within the meaning of sect. 58." Then Sir *James Hannen* says: "That is precisely the position of Lord *Henry Scott*, he is tenant for life, subject to the charges, and subject to the term—the term being merely security for the charges. Nothing stands in the way of his receipt of the rents and profits but the charges, which he might at any time redeem, and therefore, on the authority of that case, his interest, though subject to those charges, is in possession within the meaning of sect. 58." That, I think, is the principle of the decision of *In re Clitheroe Estate*, and it was the principle of the decision in *In re Jones*. In my opinion it cannot be said here that this is an estate or interest in possession, subject only to certain trusts for accumulation. It is an estate or interest, not in possession, but *in futuro*, in remainder, only to arise and to exist in possession when the term of twenty years has expired.

SIR JAMES HANNEN:—

I am of the same opinion, and I concur in all the Lord Justice has said.

(1) 26 Ch. D. 736, 744. (2) 31 Ch. D. 135.

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FRY, L.J.:—

I entirely agree in the judgment which has been delivered, and I will only make this one observation. It has been pressed on us that the conclusion to which we have arrived violates the policy of the Act. That argument is not tenable. The 58th section defines the persons who are to have the powers of tenants for life. The policy of those words is obvious. It is not intended to clothe persons whose estates are not in possession with the ample powers vested in persons whose estates are in possession.

COTTON, L.J.:—

The remaindermen who appeared to support the Appellant's case cannot be allowed their costs, they have had one decision already at the expense of the estate; but the Appellant must pay the costs of the Respondents, and also of the trustees.

Solicitors: *Prideaux & Sons*, agents for *J. R. Poole & Son, Bridgwater; Sherry.*

W. W. K.

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KAY, J.
Nov. 16, 18, 22.
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Solicitor and Client—Lease—Costs—Taxation—Election—"Undertaking any Business"—"Client"—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *s.* 1, *sub-s.* 3—*General Order under Solicitors' Remuneration Act*, 1881, *rr.* 2, 6: *Sched. I., Part II.*

The solicitors of the assigns of a lease of copyhold land wrote to *P.*, the copyholder, asking for renewed leases to their clients under a covenant in the original lease. On the 25th of July *P.'s* solicitors wrote to the solicitors of the applicants stating that *P.* had called on them with the letter, and that the matter therein referred to should have their attention, and asking for evidence of the title of the applicants. The evidence required was furnished. Some delay took place in consequence of the necessity of *P.* being admitted, and obtaining a license to demise. On the 16th of October *P.'s* solicitors were informed by the steward of the manor that *P.* could be admitted, and that license to demise would be given. On the 19th of October *P.'s* solicitors gave him written notice of their election to be remunerated according to the old system as modified by Schedule II. to the rules under the *Solicitors' Remuneration Act*. In the books of the solicitors was an entry under that date "instructions for drawing new leases," but there was no evidence as to the circumstances under which

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it was made. On the 21st of October *P.'s* solicitors sent to the applicant draft leases. The leases were granted, and the lessees, who were bound to pay the costs of the lessors' solicitors, insisted that the remuneration must be according to the scale in Schedule I. :—

Held by the Court of Appeal (affirming the decision of *Kay*, J.), that the election on the 19th of October was too late, for that the business had been undertaken on the 25th of July, and that the taxation must be according to the scale.

Held, by *Kay*, J., that where, under a lease containing a power of renewal, the assigns are liable to pay the costs of a new lease, the only person to whom any notice of election under rule 6 need be given by the lessor's solicitor is the lessor himself: the assigns not being "clients" of the solicitor within sect. 1, sub-s. 3, of the *Solicitors' Remuneration Act*, 1881, so as to make any notice to them necessary.

ON the 29th of January, 1823, *J. F. Brown* granted to *Cullingham*, a builder, a lease of a piece of copyhold land at *Brentford*, with ten houses upon it, for twenty-one years, from Michaelmas, 1822, and covenanted for three successive renewals for twenty-one years, and a final renewal for fifteen years, making up ninety-nine years in the whole. Provisions were made for granting separate leases of the different parts of the property if required. *Brown* covenanted to procure at his own expense the licenses from the lord of the manor, and to indemnify *Cullingham* from all copyhold rents, dues, and services. Every lease and counterpart was to be prepared by the solicitor of *Brown*, his heirs or assigns, but at the costs of the lessees.

Mr. *Parr* was the successor in title of the lessor. The lease had been twice renewed, and the leasehold interest in some of the houses had become vested in Mrs. *Hepburn*, in others in Mrs. *Russell*, and in the rest in Miss *Martin*.

On the 24th of July, 1885, the solicitors of these ladies wrote to Mr. *Parr* a letter shortly stating the title of the three ladies under an appointment by will to the houses, the existing lease of which (that for the third term of twenty-one years) would expire at Michaelmas, 1885, and saying: "It is proposed that on the expiration of the present lease there shall be three leases granted for the renewed term, one to each of the ladies in question of the houses appointed to her. We shall feel obliged if you will put us in communication with your solicitors and will instruct them to prepare the leases accordingly, and we shall be glad to

produce to them the marriage settlement of Mr. and Mrs. *Martin* and the probate of Mrs. *Martin's* will, by which the appointments in question were made."

On the 25th of July Messrs. *Allen*, Mr. *Parr's* solicitors, wrote to the lessees' solicitors: "Our client, Mr. *E. Parr*, has seen us with your letter of yesterday addressed to him and the matters therein referred to shall have our attention. We may say that we think we should be furnished with sufficient extracts from or abstracts of the marriage settlement and probate referred to in your letter."

On the 11th of August the abstract required was sent to Messrs. *Allen*. On the 12th of September the lessees' solicitors wrote to Messrs. *Allen* saying they should be glad to receive draft leases. On the 21st Messrs. *Allen* wrote: "We are in communication with the steward of the manor of *Ealing* as to the admission of our client to this property, and when this has been done we will send you the draft leases for perusal. In the meantime we propose to attend at your office to-morrow afternoon about three o'clock to inspect the documents comprised in the abstract of title which you have supplied."

On the 2nd of October the lessees' solicitors wrote again to hasten the matter, and on the 9th Messrs. *Allen* wrote expressing regret at the delay and hoping to let them have the drafts in a few days. On the 16th of October the steward informed Messrs. *Allen* that Mr. *Parr* would be admitted, and that license to demise would be given. On the 20th of October Mr. *Parr* was admitted, and license to demise obtained. On the 21st of October the draft leases were sent.

In the meantime, on the 19th of October, Messrs. *Allen* had written to Mr. *Parr* the following letter:—

"In order to enable us to endeavour to obtain from the lessees the whole of the costs incurred on the renewals of the leases of the *Brentford* property, it is necessary for us to give to you the enclosed notice. You will of course see that the reason for giving it is to save you from as much of the costs incurred as possible."

The notice referred to was as follows:

"We beg to give you notice that on the grant of the renewed

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leases of the premises at *Brentford* (describing them) it is our intention to charge our costs thereof and incidental thereto in accordance with Schedule II. to the General Orders made in pursuance of the *Solicitors' Remuneration Act*, 1881."

In the diary kept at Messrs. *Allen's* office there was an entry under date of the 19th of October, 1885, "*Parr's* Trusts. Instructions for, and drawing three new leases." There was no evidence as to what passed in July when Mr. *Parr* took the letter of the 24th of July to Messrs. *Allen*, nor as to the giving instructions on the 19th of October.

When the leases had been granted Messrs. *Allen* sent to the solicitors of the lessees three bills of costs, one in respect of each lease, each amounting to £16 9*s.*, total £49 7*s.*: made out on the old system as modified by Schedule II. of the rules to the *Solicitors' Remuneration Act*. The lessees obtained an order to tax. The Taxing Master taxed off £11 15*s.* from the aggregate amount of the three bills. Objections to the taxation were carried in by the lessees, who insisted that the costs ought to be made out according to the scale in Schedule I., part 2. The Taxing Master disallowed the objections, and gave his reasons as follows:—

"On the taxation, after reading the evidence, including the correspondence, I came to the conclusion that the business of preparing the lease to be granted in pursuance of the lessor's covenant was not undertaken until the lessor's solicitor had satisfied himself that the person who applied to the lessor to grant the lease was a representative of the original lessee and so entitled to have a lease granted to her, and that the letter which the solicitors wrote to the lessor and which he in his affidavit states he received on the 19th of October, 1885, was an election by writing under their hand communicated to the client before undertaking the business of preparing and completing the lease in and about which the lessor states he employed him, and consequently that the solicitors are entitled to be paid for that business according to Schedule II. of the order, and not according to the scale in Schedule I. I was also of opinion that the investigation of the title of the person claiming the right to have the lease granted is not such business connected with the lease as was

in the cases of *In re Field* (1) and *In re Emanuel & Simmonds* (2), decided to be so connected with the lease as to be included in the fee allowed by the scale Schedule I., and that it is distinct from the preparing, settling, and completing the lease and counterpart. It might have resulted in a failure by the claimant to shew a title, and such investigations might occur several times. The lease of the 29th of January, 1823, contains the agreement for the new lease, and fixes all the conditions on which it is to be granted; there could not therefore be, and in fact there were not either an agreement for or negotiations for the lease in the ordinary sense of negotiations for a lease. I have considered the objections, and I am still of the same opinion, and I disallow them."

The lessees applied to vary this certificate, and the application was heard by Mr. Justice *Kay* on the 16th and 18th of November, 1886.

Haldane, for the Applicants:—

The question is whether the election under rule 6 of the General Order to the *Solicitors' Remuneration Act*, 1881, was made in time. That rule says that: "In all cases to which the scales prescribed in Schedule I. hereto shall apply, a solicitor may, before undertaking any business, by writing under his hand communicated to the client, elect that his remuneration shall be according to the present system as altered by Schedule II. hereto; but if no such election shall be made, his remuneration shall be according to the scale prescribed by this Order." Under that rule the election must be made "before undertaking any business." Therefore, in the present case, the notice of election ought to have been given before any part of the business was undertaken. I say the "business" began and was "undertaken" on the 25th of July, 1885, and that therefore the election purporting to be made on the 19th of October was too late. "Before undertaking business" means before entering into a contract to do it.

[KAY, J.:—The words seem to mean, reading them in a common-sense view, "before beginning the work."]

(1) 29 Ch. D. 608. (2) 33 Ch. D. 40.

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I say the solicitors did begin the work when they wrote on the 25th of July.

Having regard to rule 2 (*c*) of the General Order the lump sum in the scale in Schedule I., Part II., "for preparing, settling, and completing lease and counterpart" includes all the negotiations for the lease: *In re Field* (1); *In re Emanuel and Simmonds* (2). The notice of election was in itself bad, as the letter accompanying it misstated its object.

Millar, Q.C., and *Allen*, for the solicitors:—

The real question is, what is the meaning of the expression "undertaking any business?" We submit it means "taking in hand any business." We did not "undertake" the business till we began to prepare the lease. A solicitor cannot be said to "undertake" business when he makes preliminary negotiations with a view to seeing whether he will elect under rule 6 or not. As soon as he elects he may be properly said then to "undertake" the work. *In re Field* and *In re Emanuel and Simmonds* were not cases under rule 6; the question there was whether a solicitor could, in addition to the charge for "preparing, settling, and completing lease and counterpart," make a charge for preliminary negotiations; and it was held that a solicitor who took his stand on Schedule I., Part II., could not make the additional charges. But from the judgments in *In re Field* it is to be inferred that notice of election may be given after negotiations have commenced.

The only definition of the "business" to be "undertaken" is that in Schedule I., Part II., namely, "preparing, settling, and completing lease and counterpart;" and we submit that if an election is made "before undertaking any business," as there defined, it is in time. The Applicants being liable under the original lease to pay the costs of renewal, it would seem that they fall within the definition of "client" in sect. 1, sub-sect. 3 of the Act; that is to say, they are "persons for the time being liable to pay to a solicitor, for his services, any costs, remuneration, charges, expenses, or disbursements." If that is so, it may

(1) 29 Ch. D. 608. (2) 33 Ch. D. 40.

be that the right of election under rule 6 still subsists as against the Applicants.

[They also cited *Fleming* v. *Hardcastle* (1).]

Haldane, in reply :—

The rules in Schedule I., Part II., dealing with extra work, indicate that any other charges that might arise incidental to "preparing, settling, and completing lease and counterpart" are already provided for by the General Order.

1886. Nov. 22. KAY, J. :—

I delayed pronouncing judgment in this case to give myself an opportunity of considering the General Order under the *Solicitors' Remuneration Act*, 1881.

A novel question has been raised, which is, shortly, At what time does the "undertaking any business" mentioned in rule 6 begin?

The order provides (rule 2) that the remuneration of a solicitor "in respect of business connected with," amongst other things, "leases," is to be (rule 2 (*b*)), when the transaction is completed, "that prescribed in Part II. of Schedule I." Turning to that schedule I find, under the head of "lessor's solicitor for preparing, settling, and completing lease and counterpart," a charge varying with the rent. It is obvious that this includes everything which is called in rule 2 "business connected with" leases, and not merely the preparation of the lease and counterpart; and it has been so decided in two recent cases in the Court of Appeal: *In re Field* (2), and *In re Emanuel and Simmonds* (3).

The particular rule on which the present question arises is rule 6, which provides that in cases to which Schedule I. applies a solicitor may, "before undertaking any business," by writing "communicated to the client," elect to take his remuneration according to the old system as altered by Schedule II.; "but if no such election shall be made, his remuneration shall be according to the scale prescribed by this order." This is a completely one-sided provision. No option in the matter is given to

(1) 52 L. T. (N.S.) 851. (2) 29 Ch. D. 608.
(3) 33 Ch. D. 40.

C. A. 1887 *In re* ALLEN. Kay, J.

the client. It is altogether in favour of the solicitor; and the condition that he shall elect before undertaking the business is most material, because, if he were at liberty to carry it on until he saw which was most for his benefit and then elect, the client might in every case be put at considerable disadvantage, and practically the scale would never be allowed to apply except where it was larger than the ordinary remuneration.

I am clearly of opinion that this was not intended; but that it is essential that the election should be made before the business which is covered by the scale-charge is undertaken; and the two decisions I have already referred to are important as shewing what is the business covered by the scale. In the former of them, *In re Field* (1), it was decided that the costs in respect of the preliminary negotiations for the lease were so included. In the latter, *In re Emanuel and Simmonds* (2), the costs connected with a prior agreement—though it contained certain stipulations as to repairs to be done by the lessor before the lease—were also included.

Each case must depend upon its own circumstances; but, speaking generally, I should say that after a solicitor has accepted the employment and done any work in it for his client for which he could charge him if the scale did not apply, he has undertaken the business, and it is too late for him to elect under rule 6.

Now let me apply this rule to the case before me. The facts are these. The assigns of a lease were desirous to obtain from the lessor a renewal according to a provision for that purpose in the lease. Their solicitor accordingly wrote to the lessor on the 24th of July, 1885, as follows: [His Lordship read the letter, the effect of which is above stated, and continued:—] Thereupon the lessor, on the 25th of July, saw his own solicitors, and they, by his instructions, wrote on the same day as follows: [His Lordship read the letter, the effect of which is above stated, and continued:—] That is to say, having been instructed in the matter by the lessor, they ask for proof that the Applicants are the proper persons to call for the renewal. According to the diary of the clerk of the lessor's solicitors, they, on the 27th, "looked up the deeds," meaning, I suppose, the lease. On the

(1) 29 Ch. D. 608. (2) 33 Ch. D. 40.

11th of August the Applicants' solicitors sent an abstract of their title as assigns of the lease. On the 12th, according to the diary, the lessor's solicitors perused them, the entry being, "per Abst. 6 B. S."—meaning six brief sheets—the usual entry on which to found a charge for costs. On the 14th they attended on the lessor. On the 12th of September the Applicants' solicitors wrote pressing for the draft lease for approval. On the 14th the lessor's solicitors wrote to the lessor for instructions, and on the 19th they attended on him. On the 21st they wrote to the Applicants' solicitors, stating that they were in communication with the steward of the manor as to the admission of the lessor, and that when this was done they would send the draft leases for approval, and that they proposed to attend at the office of the Applicants' solicitors to inspect the documents comprised in the abstract which had been sent.

The property being copyhold, and a license to demise being requested, the same day they wrote to the steward of the manor. On the 22nd of September they attended and examined the abstract of the Applicants' title, with the deeds and documents. On the 2nd of October the solicitors of the assigns wrote pressing for completion. On the 9th the lessor's solicitors answered, expressing their regret for the delay, and saying that the matter was having their attention, and that they hoped to send the draft leases in a few days.

At this stage of the matter, the lessor's solicitors, on the 19th of October, sent him a formal notice that on the grant of the leases "it is our intention to charge our costs thereof and incidental thereto in accordance with Schedule II;" that is, not according to the scale in Part II. of Schedule I. With this they sent an explanatory letter stating that the object of the notice was "to endeavour to obtain from the lessees" their costs on this footing.

I am of opinion that, as between the lessor and his solicitors, the business was undertaken when they wrote to the solicitors of the assigns the letter of the 25th of July, which was part of the business for which they could charge the lessor; and that after that it was too late for them to elect. The Taxing Master's view seems to be that nothing before the 19th of October was

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business connected with the lease. With that I am unable to agree.

Then it was suggested that possibly they were not too late to elect against the assigns of the lease. These, by the terms of the power of renewal in the original lease, were liable to pay all costs except the lessor's costs of procuring the proper licenses and authorities to grant the same. The suggestion, as I understand, was that this might bring the assigns within the definition of "clients" in the Act of 1881. I do not find any evidence that notice of the intention to elect was given to the Applicants; but I do not think that, even if such notice were given, it would be material. In my opinion the only person to whom notice to elect need be given is the lessor, and notice must be given before undertaking the business for him. The business, which commenced with the letter of the 25th of July, was all undertaken for the lessor, and was business for which his solicitors might charge him costs which the assigns under the provisions of the lease would have to repay, except only such part as related to obtaining the license to demise.

The application must be allowed, with costs.

G. I. F. C.

The solicitors appealed, and the appeal was heard on the 12th of January, 1887.

Millar, Q.C., and *Allen*, for the appeal:—

The question turns on the interpretation of the expression "before undertaking any business." We contend that the business was not undertaken till the 19th of October, 1885, when instructions were given to prepare draft leases, and on the same day notice of option to charge under the old system was given. In July persons unknown to the lessor applied for a renewal. The business of the granting leases was not undertaken then, it was necessary for the Applicants to shew their title, and till it was shewn that they had a title, the business of granting the leases could not arise, nor until it was known that the lessor could obtain license to demise. The business for which the scale fee is given is "preparing, settling, and completing lease and

counterpart." Suppose that in order to perfect the lessor's title it was necessary to take out letters of administration, could it be said that obtaining them was part of the business. This rule was intended to benefit solicitors, and it cannot have been intended that a solicitor should be precluded from his election by taking preliminary steps without which he would not know how to elect. The rule is properly construed as meaning that he must elect before undertaking the substantial part of the business. The business before the 19th of October was not business connected with the lease. *In re Emanuel and Simmonds* (1) shews that there may be collateral matters which can be separately charged for.

Haldane, contrà, was not called upon.

COTTON, L.J.:—

The question is whether the solicitors were sufficiently early in declaring their election to be remunerated according to the old system as modified by Schedule II. The rules fix the remuneration of solicitors for certain kinds of work, and they, no doubt, were framed after full inquiry what would be a fair remuneration for that class of work. It would be wrong to allow a solicitor after he has done any part of the business covered by his retainer to turn round and say "the scale fee will not remunerate me. I elect to be paid according to the old system," this would give a solicitor a power of dealing with the scale in an unfair way by going on with the business until he found out which mode of remuneration would be most advantageous to him. Rule 6 says that the solicitor is to declare his election "before undertaking any business." It is argued that we must look to the schedule to see what the business is for which the scale fee is given, and that the business of "preparing, settling, and completing lease and counterpart" had not been undertaken when the notice was given. This would be a strong argument if we had only the schedule to look to, but we must also look at the rules, and we find in rule 2 that the remuneration in the scale is given "in respect of business connected with leases." It

(1) 33 Ch. D. 40.

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includes therefore the whole of such business as can fairly be considered incidental to the granting of the lease. Now according to my understanding of the English language a solicitor "undertakes" a business when he accepts a retainer and agrees to do it. Had the solicitors accepted a retainer and undertaken to do this business before the 19th of October? In my opinion they had. The Respondents instructed their solicitor to write to Mr. *Parr*, which he did, stating that the Respondents were entitled to renewed leases, and asking him to instruct his solicitors to prepare drafts. Mr. *Parr* took this letter to his solicitors and put it into their hands, and that is all we know of what passed on that occasion—there is no evidence as to what was said or what instructions were given. The proper inference to my mind is, that when Mr. *Parr* put the letter into the hands of his solicitors he directed them to act for him and prepare leases if the Respondents were entitled to them, and if he had power to grant them. If it turned out that the Respondents were not entitled, or that he had not power to grant the leases, the transaction would have been an incomplete transaction for which the solicitors would be entitled to be paid according to the old system as modified by Schedule II. But the transaction was completed, and, as it seems to me, it was completed in pursuance of the instructions given to the solicitors on the 25th of July. They wrote on that day to the Respondents' solicitors: "Mr. *Parr* has seen us with your letter of yesterday, and the matters therein referred to shall have our attention," *i.e.* the whole of the matters, including the preparation of the leases if the Respondents shewed themselves entitled to them. The business, as I think, was then undertaken. I do not suspect any wrong motive in making the entry of the 19th of October in the diary, but I do not think that in the absence of any evidence as to what took place, or as to any fresh instructions or any new authority having been given, we can come to the conclusion that the business was not undertaken till that time. I do not give any opinion whether some part of the business done is not extra business not covered by the scale fee, that is not at present before us. We only decide that the solicitors undertook the business within the meaning of the rule when they were instructed by Mr. *Parr*

in July, and that the business is therefore not to be paid for according to the old system.

LINDLEY, L.J. :—

I am of the same opinion. The difficulty arises from the use of the obscure expression "before undertaking any business." Rule 2 provides that "the remuneration of a solicitor in respect of business connected with sales, purchases, leases, . . . and other matters of conveyancing," shall be such as is prescribed by Schedule I. Apart from election, then, all the business connected with granting a lease is to be paid for according to the scale, and the solicitors here have to shew that their remuneration is not to be according to the scale. Rule 6 provides that in cases to which the scale applies, the solicitor may "before undertaking any business" elect that his remuneration shall be according to the old system as modified by Schedule II. I cannot in the present case see any ground for saying that the business was undertaken so late as October, it appears to me to have been undertaken in July. Persons claiming to be entitled to the old lease apply in that month to the lessor for fresh leases under a covenant for renewal. The lessor shews the letter to his solicitors and asks them to attend to it. The solicitors accordingly enter into communication with the Applicants and the matter is carried on to completion. The solicitors, therefore, it is clear, undertook to attend to the business when the letter of the Applicants was shewn to them, and in my opinion that was "undertaking" the business within the meaning of the rule. It may be that some part of the business done was not business so connected with the granting the lease as to be covered by the scale fee, but to treat the business as not undertaken until the solicitor begins to prepare the drafts would be contrary to the true meaning of the rules.

LOPES, L.J. :—

I am of opinion that as between the lessor and his solicitors the business was undertaken on the 25th of July. The solicitors by their letter of that date to the solicitors of the lessees say: "Mr. *Parr* has seen us with your letter of yesterday addressed to him, and the matters therein referred to shall have our atten-

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tion. We may say that we think we ought to be furnished with sufficient extracts from or abstracts of the marriage settlement and probate referred to in your letter." That comes to this: "We have been intrusted by the lessor to act for him in this matter, and we ask for evidence of your client's title." In my opinion the business was then undertaken and the election by the Appellants was too late.

Solicitors: *Parker, Garrett, & Parker; Allen & Son.*

H. C. J.

C. A. 1886 NORTH, J. *June* 24. C. A. 1887 *Jan.* 20.

In re WHORWOOD. OGLE *v.* LORD SHERBORNE.

[1886 W. 232.]

Will—Construction—Gift to a Person holding a Title—Lapse—Heirloom.

A testator bequeathed a silver cup to Lord *S.* and his heirs as an heirloom. The person who was Lord *S.* at the date of the will died before the testator leaving a successor to the title:—

Held (affirming the decision of *North*, J.), that the bequest lapsed.

THOMAS HENRY WHORWOOD, D.D., of *Willoughby*, near *Rugby*, by his will, dated the 28th of February, 1881, after giving certain specific legacies of pictures and plate, bequeathed as follows:—

"To Lord *Sherborne* and his heirs my *Oliver Cromwell* cup presented to our common ancestor, Dame *Ursula Whorwood*, for an heirloom."

The testator gave the residue of his personal estate to the sons and daughters of his mother's cousins, *Catherine Dutton* and *Juliana Powles*, share and share alike.

The person who was Lord *Sherborne* at the date of the testator's will died on the 8th of March, 1883, and was succeeded in the title by *Edward Lenox*, the present Lord *Sherborne*.

The testator made five codicils to his will, by the fifth of which, dated the 6th of July, 1883, he bequeathed to his faithful friend and servant, *Charles Rixon*, all his silver and plated articles, jewellery, &c., and household effects whatsoever, and also

all other the contents of his dwelling-house at *Willoughby* which might be in or about the same at the time of his decease, and which were not otherwise specifically disposed of by his will or any codicil thereto.

The testator died on the 9th of August, 1884.

The cup called by the testator his "*Oliver Cromwell* cup," was a silver cup given by the Protector *Oliver Cromwell* to General *Ireton*, his son-in-law, in 1646, and by General *Ireton* to Dame *Ursula Whorwood*.

An originating summons was taken out by the executors, *O. Ogle* and *T. J. M. Mason*, to obtain the opinion of the Court as to the person to whom the *Oliver Cromwell* cup belonged.

Evidence was adduced shewing that the testator heard of the death of the late Lord *Sherborne* in 1883, soon after the event occurred; and also that the testator had no personal acquaintance with the late Lord *Sherborne*.

The summons was heard before Mr. Justice *North* on the 24th of June, 1886.

B. B. Rogers, for the Plaintiffs, the executors of the testator.

E. Cutler, for Lord *Sherborne*:—

The testator has indicated the purpose of the bequest; he did no intend to benefit a particular person, he did not even know Lord *Sherborne*, he evidently intended to give the cup to the person who should be Lord *Sherborne* at the time of his own death, with a hope that it would go with the title. Just in the same way as if he had bequeathed something to the Bishop of *London*; he would have intended the Bishop of *London* for the time being when the legacy should take effect. The nearest authority in point is *Re Harris' Trust* (1), where a substitutionary bequest to the "eldest child" of *A.* and the "eldest child" of *B.* was held to be made in favour of the eldest children of *A.* and *B.* at the death of the testator.

Phipson Beale, for *C. Rixon*:—

The gift is plainly to the person who answered at the time to the designation Lord *Sherborne*. If in the case of a bequest

(1) 2 W. R. 689.

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to a bishop or other corporation sole the Court should hold there was no lapse by the death of the man who was identified with the corporation, such a decision would be no guide to the interpretation of a gift to a person described by his title. Where there was a legacy to the testator's "nephew *Joseph Grant*," and one nephew of the testator of that name died and another came into existence before the testator died, it has been held that there was a lapse: *Grant* v. *Grant* (1). The fact that the legacy is given for an heirloom does not render it executory: *Theobald* on Wills (2).

S. Hall, for the residuary legatees.

E. Cutler, in reply.

NORTH, J.:—

I think the gift fails. At the time the will was made there was no doubt as to who was Lord *Sherborne*. There was only one person entitled to that appellation. Nobody could have had any hesitation in saying who Lord *Sherborne* was. No doubt the bequest did contain terms that shewed the testator intended that the cup should continue in the family of Lord *Sherborne* as an heirloom. But that fact does not alter the construction of the gift, which was intended for the then Lord *Sherborne;* though it was intended that from him it should pass on to his heir, as an heirloom, according to the testator's expressed intention, or, to adopt an old phrase not applicable to chattels, *per formam doni*. Under the circumstances I have not the slightest doubt as to who was indicated by the expression "Lord *Sherborne*." Does the fact that he died before the testator, and a new Lord *Sherborne* attained the title, alter the person to whom, down to that time, the words of the will point? In my opinion it does not. The gift was to the Lord *Sherborne* at the time the will was made; and, inasmuch as he died before the testator, the gift in his favour failed to take effect. A difficulty did, before the late *Wills Act*, in fact constantly occur, consequent on a change in the real estate of the testator after he made his will. It was for the purpose of getting over a rule that constantly defeated testators' intentions that the alteration of the law as to the subject-matter of gifts was

(1) Law Rep. 5 C. P. 380, 727. (2) 3rd Ed. p. 510.

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made by the 24th section of the *Wills Act*. But the Act did not alter the law as to objects of a gift by will. Lord Justice *Turner*, in the case of *Bullock* v. *Bennett* (1), says that the late *Wills Act*, "by its 24th section, enacts, that every will shall be construed with reference to the real and personal estate comprised in it, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. It is, with reference to the real and personal estate comprised in it, that the will is to speak as if executed immediately before the death of the testator. I understand this to mean, not with reference to the objects of the testator's bounty, who are to take the real and personal estate, but with reference to the real and personal estate, which is to be taken by those objects. Had it been intended otherwise, the words with reference to the real and personal estate would hardly, if at all, have been required to be inserted."

And that decision has been followed ever since; and, among other Judges, by Lord *Hatherley*, whose decision to the contrary was overruled in the case I have cited. I cannot see anything here to shew that "Lord *Sherborne*" is to be construed to mean "the Lord *Sherborne* for the time being," instead of the person who alone was entitled to that title at the time the expression was used.

D. P.

C. A.

From this decision Lord *Sherborne* appealed. The appeal was heard on the 20th of January, 1887.

E. Cutler, Q.C., for the Appellant:—

The true construction of the bequest is that the gift was meant for the person who would be Lord *Sherborne* at the time of the testator's death: *Re Harris' Trust* (2). It is remarkable that in all the other bequests in the will the testator mentioned the Christian names of the legatees. If there is an ambiguity in the will as to which Lord *Sherborne* was intended, the Court ought to admit extrinsic evidence as to the intention of the testator: *Doe* v. *Beynon* (3); *Grant* v. *Grant* (4).

(1) 7 D. M. & G. 283, 285.
(2) 2 W. R. 689.
(3) 12 A. & E. 431.
(4) Law Rep. 5 C. P. 380, 727.

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Phipson Beale, for *C. Rixon*, was not called on.

COTTON, L.J. :—

This is an appeal from a decision of Mr. Justice *North*, who held that a gift of a silver cup to Lord *Sherborne* and his heirs as an heirloom had failed by the death of the person who at the date of the will was Lord *Sherborne*, in the lifetime of the testator. The construction contended for by the Appellant was that the gift should be read as if it had been to the person who would be Lord *Sherborne* at the testator's death. The first question is whether the Court can admit evidence as to the intention of the testator. I am of opinion that it cannot do so. Evidence has been rightly admitted to shew that the testator knew at the time when he made his last codicil that the late Lord *Sherborne* was dead, but I do not think that fact has any effect at all upon the construction of this clause in the will. Putting aside that, what is the true construction of the bequest? It cannot be doubted that if this had been an ordinary legacy, and Lord *Sherborne* had died in the testator's lifetime, the legacy would have lapsed. But it is said that the form of the gift to "Lord *Sherborne* and his heirs, as an heirloom," is sufficient to shew that it was the testator's intention that the person who might be Lord *Sherborne* at the time of his death should take the legacy. I do not think there is any force in the argument. It comes to this, that if properly advised he would have drawn his will differently. It often happens that a testator does not anticipate what will happen, and in this case the testator supposed that Lord *Sherborne* would survive him. The Appellant, in fact, asks us to make a new will for the testator. We cannot do that, and on the construction of the bequest as it stands, I think there is nothing to justify us in giving the legacy to the person who was Lord *Sherborne* at the death of the testator.

Then it is said that in his will the testator distinguished all the other legatees by their christian names. It may be necessary to do so in the case of commoners, but it is very unusual to refer to a peer otherwise than by his title, except in the extraordinary case where two peers have the same title. But though the testator may have been more accurate in his description of

the other legatees, that does not affect the construction of the gift to Lord *Sherborne*. The appeal must therefore be dismissed.

LINDLEY, L.J.:—

I am of the same opinion, I also agree that parol evidence as to the intention of the testator is not admissible. With respect to *Re Harris' Trust* (1), the question there was whether the words "eldest child" referred to the person who would be the eldest child at the date of the will or at the death of the testator. It does not affect the question in this case at all.

LOPES, L.J.:—

I am also of the same opinion. The will of Dr. *Whorwood* contained a specific bequest in these words: "To Lord *Sherborne* and his heirs my *Oliver Cromwell* cup as an heirloom." The will was made in 1881. The testator made several codicils, the fifth of which was made in July, 1883. Lord *Sherborne* died in March, 1883, and was succeeded by the present Lord *Sherborne*. The testator died in 1884. In these circumstances the question before us is which Lord *Sherborne* was entitled to the legacy? I am clearly of opinion that it was the Lord *Sherborne* who was living at the date of the will. That being so, the legacy lapsed, and belongs to the legatee of the plate under the fifth codicil.

Solicitors for the Plaintiffs and *Rixon: Ullithorne, Currey, & Villiers*, agents for *C. B. Roche, Daventry.*

Solicitors for Lord *Sherborne: Aldridge, Thorn, & Morris.*

Solicitor for the Residuary Legatees: *J. Graham*, agent for *Withington, Petty, & Boutflower, Manchester.*

(1) 2 W. R. 689.

M. W.

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Jan. 13.

Ex parte MAYOR OF LONDON.

[1885 L. 1192.]

Solicitor—Bill of Costs—Taxation—Purchase—Statutory Title—Scale Charge—Percentage—"Investigating Title"—General Order under Solicitors' Remuneration Act, 1881, *Schedule I., Part I.*

The Corporation of *London* resolved to purchase the old Bankruptcy Court which, under sect. 68 of the *Bankruptcy Act*, 1861, was vested in the Public Work Commissioners, the purchase-money, £93,500, being payable out of funds in Court under various Acts, including the *Lands Clauses Act*, and representing lands of the Corporation taken by certain public bodies. On applying to the Commissioners the Corporation were informed that the property was vested in the Commissioners under the above section, and that they "did not agree to furnish any evidence of title," but would apply to the Lord Chancellor, under the section, for his authority to sell; and they subsequently wrote that the Lord Chancellor had authorized the sale by his secretary. The City Solicitor, however, having regard to the terms of the section, required a written authority signed by the Lord Chancellor himself, which was duly obtained. The solicitor, having thus satisfied himself as to the Commissioners' title, obtained, on summons in Chambers, an order sanctioning the purchase, the Chief Clerk, upon the production of the Lord Chancellor's authority and at the request of the solicitor, dispensing with the usual reference as to title. The purchase having been completed, the Corporation carried in their solicitor's bill for taxation, containing a charge of £278 15*s.*, according to the scale in Schedule I., Part I., of the General Order under the *Solicitors' Remuneration Act*, 1881, for "investigating title and preparing and completing conveyance." The Taxing Master disallowed the charge on the ground that there had been no investigation of title, and that therefore the scale charge did not apply: *In re Lacey & Son* (1).

On a summons by the Corporation to review the taxation:—

Held, that there had been an "investigation of title" within the terms of the General Order, and that therefore the scale charge applied.

Adjourned summons.

In May, 1885, the Court of Common Council of the Corporation of *London* passed a resolution to purchase from the Commissioners of Her Majesty's Works and Public Buildings the buildings and site of the old Bankruptcy Court in *Basinghall Street* for £93,500. As the purchase-money had to be provided

(1) 25 Ch. D. 301.

out of funds in Court representing purchase-money of lands of the Corporation taken, under the *Lands Clauses Act* and certain Acts relating to the Metropolitan railways and to the improvement of the Metropolis, by the Metropolitan and Metropolitan District Railway Joint Committee and the City Commissioners of Sewers, the costs of the re-investment of those funds were payable by those two bodies.

No formal agreement for the purchase was entered into; but, in reply to a letter from the City Comptroller announcing that, at a meeting of the Court of Common Council, the Corporation had agreed to purchase the property, the Solicitor to the Treasury, on the 24th of June, 1885, wrote thus: "The property was vested in the Commissioners of Her Majesty's Works, &c., under and by virtue of the *Bankruptcy Act*, 1861 (24 & 25 Vict. c. 134, s. 68) and is to be appropriated to such purposes as the Lord Chancellor shall direct. The Commissioners do not agree to furnish any evidence of title, but they will apply to the Lord Chancellor for directions to sell and convey the property to the Corporation. In the meantime a draft conveyance may be sent to me for perusal." In a subsequent letter the Treasury Solicitor stated that the Lord Chancellor had authorized the Commissioners of Works to sell the property to the Corporation.

The matter was then referred to the City Solicitor, who, upon perusing the *Bankruptcy Act*, considered that an authority signed by the Lord Chancellor should be obtained: whereupon the City Comptroller, at his suggestion, wrote asking for a copy of the document signed by the Lord Chancellor authorizing the sale, in order that it might be set out in the summons for payment of the purchase-money out of Court. In reply the Treasury Solicitor said the only document the Commissioners then had was a letter from the Lord Chancellor's secretary, but that he would obtain a formal authority signed by the Lord Chancellor himself. This formal authority was shortly afterwards obtained and sent to the City Comptroller.

The City Solicitor then proceeded to instruct counsel to prepare the necessary summons for the sanction of the Court to the purchase, and in the draft the usual clause was inserted asking for an inquiry whether a good title could be made to the

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property, and that, in case a good title could be made, a proper conveyance might be settled by the Judge in the usual way. Subsequently, however, upon examining and perusing the 68th section of the *Bankruptcy Act*, 1861, and the formal direction or authority signed by the Lord Chancellor, the City Solicitor satisfied himself as to the title of the Commissioners, and, to save time, instructed counsel to amend the draft summons by striking out the clause asking for an inquiry as to title, as he hoped, after his own investigation, to be able to satisfy the Chief Clerk that the title was good without a formal reference to the Conveyancing counsel to investigate it.

Upon the summons coming on before the Chief Clerk, he upon the production of the Lord Chancellor's direction, and upon the representation of the City Solicitor, made an order sanctioning the purchase, the inquiry as to title being dispensed with, and the only reference being to the Conveyancing Counsel to settle the conveyance. The costs of the Corporation of and incident to the purchase and the reinvestment were, in the usual form, directed to be taxed.

The conveyance having been executed, and the purchase duly completed, the Corporation carried in their solicitor's bill of costs for taxation. One item was a charge under the scale in Part I. of Schedule I. to the General Order to the *Solicitors' Remuneration Act*, 1881, as follows: "Scale charges on purchase-money, £93,500. Purchase, £278 15*s*."

The Taxing Master held, on the authority of *In re Lacey & Son* (1), that the scale did not apply to the case, as there was no investigation of title on the part of the Corporation, and that consequently the charge should not be made by scale under Schedule I., but should follow the old system of charging prior to the Act as altered by Schedule II. The item was accordingly disallowed. The Corporation then carried in objections to the taxation, insisting that Schedule I. applied, but the Taxing Master overruled the objections. The Corporation then took out the present summons to review the taxation. The summons was supported by an affidavit by the City Solicitor of the facts above stated.

(1) 25 Ch. D. 301.

Sir *A. Watson*, Q.C., and *Tweedy*, for the Corporation:—

In re Lacey & Son (1) merely decides that the scale in Schedule I. to the General Order under the *Solicitors' Remuneration Act*, 1881, does not apply unless the whole of the business in respect of which the charge is imposed is done. The charge in Part I. of Schedule I. "for investigating title to freehold, copyhold or leasehold property, and preparing and completing conveyance (including perusal and completion of contract if any)" is applicable to the present case. Here the whole of that business has been done, including investigating the title; for, as a matter of fact, our solicitor did investigate the two documents of title, namely, the *Bankruptcy Act*, 1861, and the Lord Chancellor's direction. The scales under the *Solicitors' Remuneration Act* apply to all conveyancing business, whether done in an action or matter, or out of Court: *Stanford* v. *Roberts* (2); *In re Merchant Taylors' Company* (3).

Farwell, for the Metropolitan Joint Committee and the Commissioners of Sewers:—

The charge is excessive for merely reading a letter and an Act of Parliament, and ought not to be allowed. The title was a statutory one, open to the world, and one which everybody knew. There was in reality no "investigation of title" at all; and, in fact, the Commissioners declined to furnish any evidence of title. Consequently *In re Lacey & Son* and also *Re Glascodine & Carlyle* (4) apply.

KAY, J.:—

I am extremely sorry I cannot in this case agree with the Taxing Master.

The question arises under these circumstances:—[His Lordship stated them and continued:—] So that what the City Solicitor did was this: being referred by the vendors to a public Act under which they had acquired their title, and under which they were proceeding to sell, he read it, examined it, and came to the conclusion upon it that something more was wanted than the mere

(1) 25 Ch. D. 301.
(2) 26 Ch. D. 155.
(3) 30 Ch. D. 28.
(4) 52 L. T. (N.S.) 781.

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Act of Parliament, and that a formal authority signed by the Lord Chancellor was required. Accordingly he applied for and obtained that formal authority, which he would not have understood was wanted without having investigated the Act of Parliament; and thereupon he satisfied the Chief Clerk that it was not worth while to have a reference to the Conveyancing Counsel as to title, and the purchase was completed on that investigation.

Now, I am told that this was not an investigation of the title. I have put several points to counsel, which have not to my mind been satisfactorily answered. Suppose, instead of one Act mentioned by the vendors, they had mentioned half-a-dozen public Acts, and said, "Under and by virtue of all these six Acts of Parliament which we give you the reference to, all being public Acts of Parliament, these properties are vested in us, and we have the power of sale;" and suppose the City Solicitor, instead of reading one, had read six Acts of Parliament, would that have been an investigation of title or not? To my mind there is only one possible answer. It does not matter how many Acts there were, or how long or short the title was. The question is, was the title investigated?

Again, it is said no abstract was furnished, the vendors saying "We are not going to give you any evidence of title;" but did that make it less necessary for the solicitor to investigate that which they said was their title? There may be an investigation of title without any abstract. There may be an investigation of title without any evidence of title being furnished by the vendor. The reason here is manifest. The Commissioners in effect said, "We are not going to give you any evidence of title, because the evidence of this title, being a public Act of Parliament, is so easily accessible to you that we need not supply you with a public Act of Parliament." That is all the Commissioners meant. They did not mean that the City Solicitor was not to investigate that public Act of Parliament; and the solicitor would have been grossly wanting in his duty if he had not investigated it with the utmost possible care.

Again, I put this question to counsel, to which no satisfactory answer has been given. Suppose this inquiry as to title had been retained, and the title had been referred to the Convey-

ancing Counsel; after the solicitor had read the Act of Parliament, suppose he had not been quite satisfied without the opinion of the Conveyancing Counsel, and had proceeded to take it, would there have been no investigation of title then? I have heard no answer to that at all: you cannot say there is no investigation of title because the title is a very short one, or because the title is a very easy one to investigate, or because the investigation took only five minutes instead of ten days. The question is, Has there been an investigation of title? Here the title was a public Act of Parliament, which vested this property in the vendors. Whether it gave them a power of sale or not was a question which the City Solicitor had most carefully to consider, and his consideration of it led to his requiring a formal authority from the Lord Chancellor: it was in consequence of that investigation of the Act that the formal authority was obtained.

Now it is not my duty to consider whether the General Order under the *Solicitors' Remuneration Act* produces a hardship or not. In this case this work is, beyond all question, greatly overpaid; and it is not the first case which has come under my personal notice in which solicitors have got very great advantage by this General Order; but I have nothing to do with that. If the Act and the order under it have produced that effect, that is what the Legislature, I presume, intended. I am not going to misconstrue the General Order, or to refuse to carry it into effect, or to make that which I think would be bad law because it produces a hardship. That is an argument I cannot listen to for a moment. I say I should have been very glad indeed if I could have come to another conclusion; but this would be impossible unless I could satisfy myself that there had been no investigation of title whatever—I am not satisfied of that: I think there has been investigation of title.

The General Order refers to several things, it says that the scale charge in Schedule I., Part I, applies "for investigating title to freehold, copyhold, or leasehold property, and preparing and completing conveyance (including perusal and completion of contract, if any)." All that has been done in this case. The conveyance has been prepared and completed. There was no contract to peruse; but the scale charge applies whether there

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was a contract or not. It is said, however, that the one other item, the investigation of title, has not been made. From that I dissent: there has been an investigation of such title as there was—and I therefore am sorry to say that I must differ from the Taxing Master, and allow this summons, with costs.

Solicitors: *The City Solicitor; Baxters & Co.*

G. I. F. C.

KAY, J.
1887
Jan. 14.

FUSEE VESTA COMPANY *v.* BRYANT & MAY, LIMITED.

[1886 F. 1998.]

Patent—Specification—Infringement—Action—Disclaimer—Motion for Leave—Form of Order—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 19.

On a motion, under sect. 19 of the *Patents, Designs, and Trade Marks Act*, 1883, by the Plaintiffs in an action for infringement of their patent dated in 1885, for liberty to apply at the Patent Office for leave to amend their specification by disclaimer, an order was made granting the leave asked for on the following terms, no statement of claim or defence having yet been delivered: No further proceedings to be taken in the action until the disclaimer had been properly made, and, if so made, the Plaintiffs to pay the Defendants' party and party costs of the action up to disclaimer: the Plaintiffs to undertake forthwith to take proceedings for disclaimer and then to amend their action by stating the disclaimer, founding the action simply upon the specification as amended.

THIS was an action for the alleged infringement by the Defendants of a patent belonging to the Plaintiffs and taken out in 1885. The action had not proceeded beyond writ, no statement of claim or defence having yet been delivered.

The Plaintiffs now moved for liberty to apply at the Patent Office for leave to amend the specification of their patent by disclaiming the first claiming clause thereof, and by making such other alterations as would be rendered necessary thereby, and that, pending the decision of such application, all further proceedings in the action might be stayed.

Moulton, Q.C., and *Bousfield*, for the Plaintiffs:—

This being a pending action, the motion is made under sect. 19

of the *Patents, Designs, and Trade Marks Act*, 1883, which says that " in an action for infringement of a patent, and in a proceeding for revocation of a patent, the Court or a Judge may at any time order that the patentee shall, subject to such terms as to costs and otherwise as the Court or a Judge may impose, be at liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer, and may direct that in the meantime the trial or hearing of the action shall be postponed." We submit that we are entitled to the leave asked for on the terms of our paying the Defendants' costs of the action up to the amendment of the specification under the disclaimer. Under sect. 20, damages may be recovered for infringement prior to the disclaimer, if it is proved that the original specification " was framed in good faith and with reasonable skill and knowledge."

Sir *R. Webster*, A.G., *Aston*, Q.C., and *Carpmael*, for the Defendants:—

The additional terms should be imposed on the Plaintiffs that the specification, as amended by the disclaimer, should not be receivable in evidence in the action: *Singer* v. *Stassen* (1).

The meaning of sect. 20 is that, after disclaimer, the onus lies on the plaintiff of satisfying the Court, by affirmative evidence, that his original claim was framed in good faith and with reasonable skill and knowledge: if he fails to do that, he cannot recover damages for infringement prior to disclaimer.

Moulton, in reply:—

In *Singer* v. *Stassen* the action was brought prior to the 1st of January, 1884, the date of the commencement of the Act. The argument in that case proceeded on sect. 113, which does not apply to this case. The policy of the Act is that a disclaimer —which is merely the excision from the specification of something that is bad—shall not prevent the patentee recovering damages for infringement of that which is good.

KAY, J.:—

This matter seems to me to be extremely simple. The Plaintiffs, who are patentees, have brought an action against the

(1) 1 Pat. Ca. Rep. 121.

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Defendants for infringement of a patent. Having brought that action, and before it has proceeded very far, the Plaintiffs apply to the Court by this motion asking leave to allow them to disclaim part of their specification and to stay proceedings in the action in the meantime. That is an indulgence which the Court in a proper case—and I see no reason to suppose that this is an improper case—will grant; but then it will be granted on terms. The question is, upon what terms? Now, the man who comes to the Court and says, "I find it necessary to disclaim part of my patent," thereby admits that there is a part of his patent which he cannot support; and the consequence of that is that, if this action were to go on, it would be dismissed with costs, supposing the Defendants were to take the objection that the patent is bad; because, if you prove that any part of the specification is bad, that destroys the patent. So that I must, on this statement of the Plaintiffs themselves, assume that this is an action which cannot succeed; because, of course, I cannot assume that there will be a defect of evidence, or anything of that kind. The Plaintiffs, then, admitting that their patent is one which cannot be supported as it stands; it is perfectly clear, I think, what the terms are which should be imposed. The Plaintiffs have brought an action which must, according to their own admission, be dismissed with costs. They have put the Defendants to certain costs in that action, and as one of the terms, therefore, of allowing them to amend their specification, I must require them in one form or another to pay the costs of this action up to the time of the amendment of their specification.

No doubt it is quite right that no further proceedings should be taken in this action until the specification has been amended. The other term which it seems to me necessary to impose is, that all the Defendants' costs of this action up to that time must be paid by the Plaintiffs, to be the Defendants' costs in any event, without a separate taxation.

Now it is said that the course to be adopted in such a case as this has been laid down by the Court of Appeal in *Singer* v. *Stassen* (1), and that in that case one of the terms imposed by the Court for allowing the plaintiff to amend his specification by

(1) 1 Pat. Ca. Rep. 121.

disclaimer was that, in the action in which the application was made for leave to amend the specification, the amended specification should not be given in evidence: that is to say, the only specification to be given in evidence was to be the old specification; and the consequence of this would be that the action would go to trial with only the old specification to be given in evidence, and the defendant would be put, if the plaintiff was foolish enough to go on with the action, to the cost of proving that a portion of that specification was bad; and if he succeeded, as I assume he would, the action would be dismissed with costs. It would be a perfectly futile trial, and the Court cannot but see, at the time the application is made, that the trial must necessarily be supposed to be one which could not succeed. The consequence of imposing such terms would be that the plaintiff would be practically obliged to dismiss his action. The simpler course would be to say that the Plaintiff must dismiss his action and bring a fresh one, if he means to go on. But why should I put the parties to the expense of a fresh action? That does not seem to me to be necessary for the ends of justice: practically, in my opinion, the same result may be arrived at—at least in this case, where very little has been done in the action—by saying that the terms which should be imposed are these—that no further proceedings should be taken in this action until the disclaimer has been properly made; that if the disclaimer is so made the Plaintiffs must pay all the Defendants' costs of this action up to the disclaimer, as between party and party. They must undertake forthwith, if they mean to go on with their action, to take proceedings by way of disclaimer, and then to amend the action by stating the disclaimer, founding the action simply upon the specification as amended; or if they do not choose to do that, they must dismiss the action. That is the order which I think it right to make, and those are the terms which I must impose upon the Plaintiffs if they wish to amend their specification. I give no directions as to the costs before the Comptroller of obtaining the disclaimer.

Solicitors: *Hindson Miller & Vernon*; *Wilson, Bristows, & Carpmael.*

G. I. F. C.

CHITTY, J.
1886
Dec. 20.

In re BELL.
LAKE *v.* BELL.

[1881 B. 1854.]

Solicitor and Client—Statute of Limitations.

In 1868, upon the death of the mortgagor, the mortgaged property was sold by *A.*, the mortgagee, under the power of sale contained in the mortgage deed. The balance of the proceeds after payment of the mortgage debt was retained by *B.*, who, in effecting the mortgages, had acted as solicitor for both parties, and conducted the sale on behalf of *A.* The power of sale in the mortgage deed contained the usual provision that the surplus proceeds should be paid to the mortgagor, his heirs, or assigns.

The mortgagor had died unmarried and intestate, and being illegitimate left no next of kin. Administration had not been taken out to him.

A. died in 1877, having left all his property to his widow, *C.*, whom he appointed his executrix.

C. died in 1878, having appointed *B.* and *R.* her executors. Upon the death of *B.* in 1881, *R.*, as being through *C.* the legal personal representative of *A.*, claimed as against *B.'s* estate the balance of the proceeds of the sale in 1868 of the mortgaged property:—

Held, that *B.*, having received this balance in a fiduciary character as agent for *A.*, and with full knowledge that *A.* was an express trustee of the balance for the mortgagor, and, in the circumstances, liable to a claim by the Crown, had brought himself within the principle of *Burdick* v. *Garrick* (1), and, accordingly, that the *Statute of Limitations* could not be set up as a bar to the claim.

FURTHER CONSIDERATION.

By indenture of the 17th of February, 1865, *William Scupham* mortgaged property to *G. R. Willoughby* to secure payment of £450 and interest. The mortgage deed contained the usual power of sale in case of default in payment, and provided that the surplus, if any, of the moneys arising from the sale should be paid to the mortgagor, his heirs or assigns. The testator, *John Hyde Bell*, acted as solicitor for both parties in this mortgage transaction.

William Scupham, who was illegitimate, died in June, 1868, unmarried and intestate. In October, 1868, *Willoughby* offered the mortgaged property for sale, and it was duly sold and conveyed to the purchaser.

(1) Law Rep. 5 Ch. 233.

J. H. Bell, as solicitor for the vendor, received the purchase-money, and thereout paid *Willoughby* the principal and interest due on his mortgage, and discharged a second mortgage created by *Scupham* on the property. After payment of the mortgage debts and of the costs, charges, and expenses of the sale, and certain bills of costs due to himself from *Scupham*, a balance of £243 6*s.* 5*d.*, remained in the hands of *Bell*.

G. R. Willoughby died on the 17th of July, 1877, having by his will devised and bequeathed all his real and personal estate to his wife *Susannah*, and appointed her executrix. *Susannah Willoughby* proved her husband's will, and died in January, 1878, having by her will appointed *J. H. Bell* and *William Ranshaw* executors thereof.

No claim had been made to the balance of the proceeds of sale of the mortgaged property by any one claiming to be the representative of *William Scupham*, nor had administration to his estate been taken out.

J. H. Bell died in March, 1881, and in April, 1881, a creditor's action was commenced for the administration of his real and personal estate.

In this action a claim was brought in by *William Ranshaw* (the surviving executor of the will of *Susannah Willoughby*) as legal personal representative of *G. R. Willoughby*, the mortgagee, for the balance of £243 6*s.* 5*d.* with interest against the estate of the testator, *J. H. Bell*.

The claim was adjourned to the Judge, and by him directed to stand over to be dealt with on the hearing of the action on further consideration.

Macnaghten, Q.C., and *Warrington*, in support of the claim :—

The money was received by *Bell* in a fiduciary character within *Burdick* v. *Garrick* (1), so as to bar the operation of the *Statute of Limitations*.

Romer, Q.C., and *Nalder*, for the executors of *Bell* :—

We rely on the *Statute of Limitations* as a bar to any claim to this money which came into *Bell's* hands in October, 1868, with-

(1) Law Rep. 5 Ch. 233.

CHITTY, J. 1886 *In re* BELL. LAKE *v.* BELL.

out any claim having been made to it until that put forward by *Ranshaw* in the course of this action. The money was received by *Bell* in the ordinary character of agent, and the relation of solicitor and client is not that of trustee and *cestui que trust*, so as to prevent the operation of the statute: *In re Hindmarsh* (1); *Crawford* v. *Crawford* (2).

Macnaghten, in reply:—

Willoughby was a trustee of the surplus for the mortgagor, or any person claiming under him, and therefore his solicitor, by whom the surplus was received, ought to be made liable to the claim by *Willoughby's* representative.

CHITTY, J. (after stating the facts, continued):—

In my opinion, *Ranshaw*, as legal personal representative of *Willoughby*, is entitled to recover the £243 6*s.* 5*d.*, which represents the balance of the proceeds of sale of the mortgaged property. There was in the mortgage deed an express trust as to the surplus moneys arising from the sale. The surplus moneys were therefore a trust fund, and *Willoughby* was a trustee for the mortgagor and would be exposed to claims through *Scupham*. If the *Statute of Limitations* applied as was contended, the result would be that *Willoughby* would be liable to pay the money out of his own pocket. The position of *J. H. Bell* was such that he knew that *Willoughby* was an express trustee of the £243 6*s.* 5*d.* for the mortgagor, and liable under the circumstances of the case to a claim by the Crown. The testator, *J. H. Bell*, received this balance as agent in a fiduciary character, and consequently brought himself within the principle laid down by Lord *Hatherley* in *Burdick* v. *Garrick* (3). The *Statute of Limitations* cannot therefore be set up as a bar to the claim of *Ranshaw*. Interest will be limited to 4 per cent. on the amount from the date of the claim.

Solicitors: *Collyer-Bristow, Withers, Russell & Hill.*

(1) 1 Dr. & Sm. 129. (2) 16 W. R. 411.
(3) Law Rep. 5 Ch. 233.

F. G. A. W.

CHITTY, J.
1887
Jan. 28.

In re DUKE OF SOMERSET. THYNNE *v.* ST. MAUR.

[1886 S. 1448.]

Married Woman—Guardian ad litem—Infant Defendant—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), s. 1—*Rules of Supreme Court*, 1883, *Order* XVI., *r.* 16.

The general rule that a married women cannot act as a next friend or guardian *ad litem* has not been abrogated by the *Married Women's Property Act*, 1882, s. 1, sub-s. 2, which, in providing that she shall be capable of suing and being sued . . . in all respects as if she were a *feme sole*, is limited to actions relating to herself personally.

IN drawing up the order on the judgment delivered in this case on the 14th of December last, the Registrar took the objection that Lady *Ramsden*, who on her consent to act had been appointed guardian *ad litem* of the infant Defendants in May last, was not, being a married woman, a fit and proper person to act as guardian *ad litem*, and declined to proceed with the order.

Latham, Q.C., now mentioned the matter to the Court, and submitted that, having regard to the *Married Women's Property Act*, 1882—which provides (sect. 1, sub-sect. 2) that a married woman "shall be capable . . . of suing and being sued either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*"—had removed her former incapacity, the stringent rule that a married women could not act as a next friend or guardian *ad litem* must be taken to have been relaxed.

Badcock, for the infant Defendants.

CHITTY, J.:—

Before the passing of the *Married Women's Property Act*, 1882, it was the established practice that a married woman could not fill the office of next friend or guardian *ad litem*, and the rule appears to have been founded on the incompetence of a married woman to sue and be sued, and to be answerable in costs. Now

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the *Married Women's Property Act* has not made a married woman a *feme sole* for all purposes, but has rendered her capable of suing and being sued in matters relating to herself personally. In that respect her general incapacity was removed by sect. 1, sub-sect. 2, but there is nothing in the section to remove the particular incapacity to be guardian *ad litem* or next friend of an infant, and I should be wrong if I altered the former practice in that respect. I find that the Rules of Supreme Court, 1883, Order XVI., rule 16, provide that infants "may sue as plaintiffs by their next friends, in the manner heretofore practised in the Chancery Division, and may, in like manner, defend by their guardians appointed for that purpose." The rule, therefore, on the face of it incorporates the old practice of the Chancery Division, and it also shews that the framers of it had the *Married Women's Property Act* in view when they framed the rule, for it goes on to say that "Married women may sue and be sued as provided by the *Married Women's Property Act*, 1882." On reading those rules, therefore, it appears that it was not intended to remove the disability of a married woman to act as next friend or guardian *ad litem*. And there are many reasons why it may not be for the advantage of infants to be represented by a married woman in legal proceedings. I need not discuss them, as I base my judgment on the fact that her personal incapacity in this respect has not been removed. To grant the application would be a dangerous innovation, as a married woman, so far as I can see, would not be responsible for the costs of an improper action, or liable to pay those of an improper defence, or, at most, would only be responsible for such costs to the extent of her separate estate, which would necessitate an inquiry as to her separate estate with all its attendant inconveniences.

The right course will be to remove the present guardian *ad litem* and refer it to Chambers for an inquiry, as in *Peter* v. *Thomas-Peter* (1), and for the appointment of a new guardian *ad litem*.

Solicitors: *Walters, Deverell, & Co.; Crowders & Vizard.*

(1) 26 Ch. D. 180.

F. G. A. W.

In re PHILLIPS (AN INFANT.)

CHITTY, J.

1887

Feb. 5.

Infants' Settlement Act (18 & 19 *Vict.* c. 43), s. 4 [*Revised Ed. Statutes, vol. xii., p.* 469]—*Settlement upon Marriage—Marriage of female Infant under the age of Seventeen.*

The Court has jurisdiction in a case where a female infant has married under the age of seventeen, after she has attained that age, to direct a proper settlement of her property to be executed.

THIS was the petition of *N. M. T. Phillips*, an infant, and her husband, *J. H. Phillips*, that a binding settlement of the infant's property might be made with the approbation of the Court.

The infant Petitioner was born on the 5th of October, 1869. On the 11th of March, 1886, she was married at a Registrar's office to the Petitioner, *J. H. Phillips*, and on the 28th of the same month a marriage was solemnized at a parish church in *Sussex*.

Under the will of her father the infant Petitioner became upon her marriage entitled to one-fifth share of the proceeds of sale and conversion of his real and residuary personal estate, and under the will of her aunt, who died in April, 1885, she was also entitled in reversion expectant on the decease of another aunt, and contingently upon her attaining twenty-one, to one-fifth share of the proceeds of sale and conversion of the real and residuary personal estate of her said aunt.

By an indenture, dated the 29th of March, 1886, the Petitioner, *J. H. Phillips*, and all other necessary parties, covenanted with the trustees therein named as soon as the said *N. M. T. Phillips* attained seventeen, to take all proper proceedings for obtaining the sanction of the Court to a settlement of her property in pursuance of the *Infants' Settlement Act*.

The question was, whether having regard to the 4th section of the *Infants' Settlement Act* (18 & 19 Vict. c. 43), the infant when she married being under the age of seventeen, the Court had power to direct a settlement of her property to be executed.

Sect. 4 of the Act is as follows:—

"Nothing in this Act contained shall apply to any male infant

CHITTY, J. under the age of twenty years, or to any female infant under the age of seventeen years."

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In re PHILLIPS (AN INFANT).

Dunning, in support of the petition:—

The case of *In re Sampson and Wall* (1) is in my favour, although it is not a direct decision on this point, Earl *Selborne* there says (2) it is arguable that although until the age mentioned in the 4th section is attained no benefit can be obtained from the Act, yet that the incapacity to make a settlement ceases after that age has been attained, and that then a settlement, if really and truly a settlement upon the occasion of the marriage and caused by the marriage, and considered by the Court to be desirable and proper, may be made.

The object of the 4th section is to discourage unreasonably early marriages by not allowing the parties to make an antenuptial settlement before a certain age, but the Court of Appeal having, in the case I have referred to, decided that a settlement of an infant's property may be made after the marriage has taken place; and in this case the incapacity to make a settlement ceasing when the infant attained seventeen, I submit that the Court can now direct a settlement of her property to be made, although she married before she attained seventeen. It is as necessary, if not more necessary, to protect a female under seventeen as one over that age.

CHITTY, J.:—

In this case the young lady who was married when she was a few months under the age of seventeen, having now attained that age, presents a petition together with her husband, who has by deed covenanted to take all necessary steps for the purpose of having a proper settlement executed, asking the Court to have a binding settlement of her property made.

The question which I have to decide is, having regard to the *Infants' Settlement Act*, and particularly sect. 4 of that Act, whether I can order a settlement to be made.

The Court of Appeal has decided in the case of *In re Sampson and Wall* that a settlement of an infant's property may be

(1) 25 Ch. D. 482. (2) 25 Ch. D. 495.

made on the occasion of his or her marriage after the marriage has taken place. The Court of Appeal having decided that there is jurisdiction to approve of a settlement upon the marriage, I ought not to put too narrow a construction on the words of the Act. I think that what I am asked to do may fairly be said to be upon the occasion of the marriage, and that I should be straining the words of the Act if I were to say this is not upon the occasion of the marriage, though it is true that some little time has elapsed since the marriage took place.

But there still remains the question on the 4th section of the Act, which is in these words:—[His Lordship read the section.] Now in order to arrive at the true construction of this proviso it is necessary to ascertain what the Act in substance does. Sect. 1 creates a general capacity with a limitation in respect to powers in an infant to bind himself or herself:—[His Lordship read the section, and continued:—] Sect. 2 contains a proviso limiting the extent to which an infant is capacitated to make a settlement by sect. 1. Sect. 3 deals with the machinery to be used. Then we come to sect. 4. The right reading of the proviso there contained is, that a female infant is not capacitated to make a binding settlement under the age of seventeen, but there is a power after that age upon the occasion of the marriage to make a binding settlement with the sanction of the Court. I think the case falls within the second alternative stated by Earl *Selborne*, in the case of *In re Sampson and Wall* (1), and referred to by counsel for the Petitioners. It would be a strange thing if a female infant marrying one day under the age of seventeen, and applying to the Court one day after attaining that age was to be excluded from the benefit of the Act. It is just as necessary, and perhaps more so, to extend the protection of the Act to a female infant under seventeen as to one over that age. To hold otherwise would be to afford additional facilities to needy adventurers anxious to get hold of the property of infants.

The petition will be referred to Chambers to approve of a proper settlement.

Solicitors: *Talbot & Tasker*, agents for *H. L. Staffurth, Bognor.*

(1) 25 Ch. D. 495.

G. M.

NORTH, J.
1886
Dec. 17, 18.

STANIAR *v.* EVANS.
EVANS *v.* STANIAR.

[1865 S. 46.]
[1865 E. 21.]

Practice—Rectification of Order—Mistake—Misrepresentation—Trust—Solicitor.

Where a wrong order has been made by reason of misrepresentation or mistake of fact, the error may be corrected by a new order made notwithstanding the former order.

A solicitor employed in trust business is the solicitor of the trustees personally, and has no direct claim on the trust estate for costs.

An order was made on a trustee to pay into Court interest found due from him, and the balance beyond his costs to be taxed of capital money certified to have come to his hands. The capital money had been received by the trustee's solicitors as part of the trust estate. The order was made on statements implying that the trustee, who was totally unable to pay, was solvent. The trustee having made default in payment of the interest, the Court made an order notwithstanding the former order that the solicitors should pay into Court the capital come to their hands with interest.

THESE suits were instituted for the execution of the trusts of an indenture of settlement dated February, 1835. The Plaintiffs in the first suit, *John Staniar* and *Stephen Dawson*, were the trustees of the settlement. *John Staniar* died after the commencement of the suits.

By a certificate dated June, 1886, the Chief Clerk found that the property then subject to the trusts of the settlement consisted of particulars, including a sum of £660, in the hands of *Stephen Dawson;* and that there was due from *Stephen Dawson* in respect of interest a balance of £1596 17*s.*

The £660 consisted of some mortgage debts paid off. They were paid to Messrs. *Earle & Co.*, the trustees' solicitors, together with a sum of £12 1*s.* 4*d.* for interest, and remained in the hands of Messrs. *Earle.* The balance of £1596 17*s.* included the £12 1*s.* 4*d.* interest received by Messrs. *Earle*, and interest at 4 per cent. on the capital sum of £660 in their hands.

The causes came on for further consideration on the 30th of

June, 1886, and the Court ordered "That the Plaintiff *Stephen Dawson* on or before the 30th of July, 1886, or subsequently, within four days after service upon him of this order, do pay into Court, as mentioned in the schedule hereto, the sum of £1596 17*s.* by the Chief Clerk's said certificate certified to be due from him in respect of income of the property subject to the trusts of the settlement dated the 21st of February, 1835, in the said decree mentioned."

And it was "referred to the Taxing Master to tax as between solicitor and client the costs of the Plaintiffs and Defendants, and of the said persons attending these causes, including in the costs of the Plaintiff, *Stephen Dawson*, and the late Plaintiff, *John Staniar*, any charges and expenses properly incurred by them, or either of them, as trustees or trustee of the said indenture of settlement dated the 21st of February, 1835."

And it was ordered "that the said *Stephen Dawson* be at liberty to retain the amount of his costs and of the costs of the late Plaintiff, *John Staniar*, when so taxed as aforesaid, out of the sum of £660 by the Chief Clerk's said certificate certified to be in his hands, and that the Plaintiff, *Stephen Dawson*, do within fourteen days after the date of the Taxing Master's certificate to be made in pursuance thereof, or subsequently within four days after service upon him of the said certificate, pay the balance of the said sum of £660 after payment thereout of such taxed costs as aforesaid into Court as directed by the schedule hereto, such balance to be certified by the Taxing Master.

"And in case the said sum of £660 shall be insufficient to pay the said costs in full, It is ordered that the Plaintiff *Stephen Dawson* be at liberty to retain the same in part payment of the said costs."

On the occasion of the order being made, counsel for *Stephen Dawson* objected to having the £660 paid into Court at once and before his costs were taxed and deducted, on the ground that to make the order in that form would be a reflection on the character of *Stephen Dawson*, and assented to having a month fixed as the time within which the sum due for interest was to be paid.

In the result it proved that *Stephen Dawson* was, to the knowledge of his solicitors, utterly impecunious at the time the order

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was made, and there was no probability of his being able to pay anything whatever.

This was a motion on the part of beneficiaries, made in the suits and in the matter of the several partners of the firm of *Earle & Co.* as solicitors, that notwithstanding the order of the 30th of June the several partners might be ordered to pay into Court the sum of £672 1*s.* 4*d.*, and other sums, part of the trust property, with interest. There was evidence that the other sums had been received without notice that they were part of the trust property.

Cozens-Hardy, Q.C., and *Farwell*, for the motion:—

The order of the 30th of June was made on the understanding and on the representation that *Stephen Dawson* was about to pay in the £1596; had there been any doubt that the money was forthcoming, the whole sum due would have been ordered to be paid in. That error can now be corrected without rectifying the order already made in terms, about which there might be a difficulty, by making a fresh order notwithstanding the former order: *Nicholson* v. *Norton* (1).

The solicitors of the party on whose behalf the representation was made, though it was made without *mala fides*, will not be allowed to take advantage of the mistake, and must indemnify the estate for the loss occasioned thereby: *In re Spencer* (2); *Re Ward* (3). They can be ordered to pay the money in their hands into Court, under the special jurisdiction the Court has over its officers, without the necessity of an action. As it is shewn that the other sums were received without notice of their being trust property, we only ask for an order on the solicitors for payment of the £672 and interest.

Cookson, Q.C., and *George Henderson*, for other beneficiaries.

Napier Higgins, Q.C., and *Samuel Hall*, for Messrs. *Earle*:—

The order of the 30th of June was made in a not unusual form, and therefore is in a proper form, that ought not now to be questioned. If, at the time, a different form of order had been pressed

(1) 7 Beav. 67. (2) 39 L. J. (Ch.) 841.
(3) 31 Beav. 1.

for, counsel were instructed and prepared to argue the question, and were ready with authorities upon the subject.

[NORTH, J.:—Which is the strongest case in support of the proposition that the costs should be taxed, and deducted from the money due from a defaulting trustee, before any payment in is ordered?]

Such an order was made in *Cooper* v. *Pitcher* (1) and *Harmer* v. *Harris* (2).

Supposing the order to be wrong so far as the defaulting trustee is concerned, it is not right that the solicitors, who were merely his agents, should be brought into the matter or ordered to pay the money personally: *Maw* v. *Pearson* (3); *Barnes* v. *Addy* (4); *Lydney and Wigpool Iron Ore Company* v. *Bird* (5); *Cordery* on Solicitors (6).

Solicitors, who have *bonâ fide* received a part of trust property in payment of costs, cannot be afterwards made accountable for it: *Stott* v. *Milne* (7).

NORTH, J.:—

It is necessary to consider why the order was made in the shape it was. It is not in the usual form. There is no doubt whatever what the usual form is. The usual form of order, where a trustee is in default, provides that he cannot receive any costs out of the trust estate, and cannot even take any part of his own share, if any, in the trust estate, till that default has been made good. That is the general rule; and it is departing from the common form, the right form, of order, when, instead of directing the balance to be paid into Court, and then the costs to be taxed and be paid out, the form is adopted of directing that the costs shall be allowed in the first place, and the residue of the balance only shall be paid into Court. That is a course not unusual, but it is not the usual form, and the usual form is only departed from by special order. The reason why it is departed from at all is this. It very often happens that a trustee

(1) 4 Hare, 485.
(2) 1 Russ. 155.
(3) 28 Beav. 196.
(4) Law Rep. 9 Ch. 244.
(5) 33 Ch. D. 96.
(6) Page 87.
(7) 25 Ch. D. 710.

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has balances in hand which he is perfectly able, and ready, and willing, to pay into Court. If he were ordered to pay into Court those full balances without any deduction, and he had already paid out of his own pocket the costs payable to his solicitor, the effect of the order that he should pay in the full balance and have the costs back again, would be to compel him to take out of his own pocket a sum which must inevitably come back again to him, and, therefore, without any necessity, leave him out of pocket for a time by the amount of those costs. Therefore sometimes a person as to whose ability to pay in what is due there is no doubt, is allowed to deduct his costs from the money in his hands, and pay the balance in. But that is always a matter of favour and nothing else. I am told that when this matter was before the Court on further consideration the counsel who appeared for this defaulting trustee were instructed to argue the point, to contend that the form in which the order was made was a matter of right, and that they were entitled to have it made in that shape instead of in the form of paying in all balances due, and then having their costs out. It is very unfortunate that they did not say one single word on the subject. If they had done so—if there had been any argument to indicate to the Court that there was reason for preferring that form of order to the other, it would have been apparent there was some doubt whether the balance would be paid, and the order would never have been made in the form it was. I asked yesterday, on being told that counsel had had cases furnished to them in support of the contention I have mentioned, for the strongest of those cases, and a case was referred to by counsel which is no authority whatever on the subject. It was an instance of the order being made in the form in which this order was made, but it did not indicate in the slightest degree that it was a matter of right. On the contrary, it is not a matter of right at all. Therefore, the rule being what I have said, there being certain cases in which it is departed from, it was departed from in this case upon the representation to the Court that the sum which had to be paid in was about to be paid in in full.

Then I should say this further. It now appearing that no part of the £1596 can be paid, it is suggested that the order for

allowing the costs out of the other sum can stand. It is clear to me beyond all question that, unless the balance due were to be paid in at once, the order is as wrong as can be, and to set it right by appeal would be a matter of course. It was not a consent order. There is a right of appeal, and the Court of Appeal would under the circumstances now appearing vary that order. But it does not appear to me necessary to put the parties to appeal. It seems to me now, knowing what I do and what I did not know when the order was made, competent to make an alteration in the effect of the order. There is a strong analogy for what I am going to do in the case of *Gaunt* v. *Taylor* (1). An order had been made on further consideration directing that the costs of trustees and other parties to the action should be taxed and paid out of the fund. There was no direction as to the order in which those costs should be paid. Subsequently it was brought to the attention of the Court that the estate was not sufficient to bear all those costs, and the Court thereupon directed that, notwithstanding the order for payment of all costs out of the fund, the executor's costs should be paid first, and the costs of the other parties only so far as they could be, out of what remained of the fund after paying the executor's costs. That case was followed, to my own recollection, by Lord Justice *James*, when Vice-Chancellor, in a case in which, on further consideration, the costs of all parties had been ordered to be paid without preference or priority out of what was at the time an ample estate; by reason of expensive proceedings on appeal from the order and variation of that order, considerable further costs had been incurred, and the addition of those subsequent costs, which were payable to the executors, increased their costs so much that the estate was no longer sufficient to pay all the costs; and the Vice-Chancellor held that, by reason of what had taken place, he must then order what the order on further consideration did not direct, viz., that the costs of the executors should be paid first, and the other costs afterwards paid so far as the surplus was available to pay them. In the present case it seems competent to me, following that analogy, to direct that the taxation and payment of costs out of the £660 be deferred until the £1596 has been paid into Court,

(1) 2 Hare, 413.

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and that in the meantime the £660 be paid into Court; and I am prepared to make the order in that shape now.

But there is a further ground on which it seems to me I ought to give such direction as I am asked to do. The order was made on further consideration, on the footing that the sum of £1596 was to be paid at once and that there was no difficulty in paying it. [His Lordship considered what occurred on the hearing on further consideration, referring to shorthand writers' notes and his own notes, and the evidence now before the Court as to the position of *Stephen Dawson*, and proceeded :—] Under those circumstances I come to the conclusion that there has been a representation made to the Court on the footing of which the order was obtained, which representation was silent as to important and material information, such as if given would have prevented the order from being made in the shape in which it was made. I hold, therefore, as regards *Stephen Dawson* that the taxation of costs, and their allowance out of the £660 should be postponed for the present, and that in the meantime the £660 should be ordered to be paid into Court. The present notice of motion refers to the fact that the solicitors have received out of the trust funds this sum of £660; and also two sums of £200 and £59. No application has been made to me at the bar in respect of the two latter sums, because the solicitors have put in an affidavit shewing that when they received those sums they had no notice that they were any portion of the trust estate. That being so, it seems to me that the solicitors could not, under any circumstances, have to pay those back. But, as regards the first sum, it was not disputed that it was paid to them, or allowed to be received by them—I do not know the circumstances under which it got to their hands—some time ago; that they did receive it knowing it to be part of the trust estate; and that they have applied it towards payment of their costs. It is said that they, having been paid, have a right to keep that sum, and remarks have been made as to the position of solicitors of trustees, with respect to which I think it well that parties should understand what their rights are. The person employed by trustees to act as their solicitor with respect to a trust estate, is commonly enough said to be a solicitor to the trust estate. But that is an inaccurate

way of describing his position. He is not solicitor to the trust estate. He has no retainer from the trust estate, and he is not employed by the trust estate, but he is the person employed by the trustee for his own purposes as trustee. His retainer is by the trustee personally. The trustee personally is liable to pay his costs, and the trustee personally is the only person to whom the solicitor can look for those costs. The solicitor of the trustee has no lien whatever upon the trust estate for those costs. That is the general rule. There are certain exceptions to it by which a trustee's solicitor may in that character have a better claim. He may, for instance, have got a statutory charge by an order of Court in respect of his having recovered or preserved either the whole of the trust fund or some part of it. He may possibly have some lien on documents in his hands. He may have a right, as between himself and his client, to go against that client's share of the trust estate. But, except in those respects, he has no claim on the trust estate; the general rule is what I have stated. The trustee, on the other hand, has a right to be indemnified out of the trust estate with respect to expenses properly incurred by him on behalf of that trust estate, including among other things costs properly incurred by him in employing a solicitor, and the trustee having a right to be indemnified by the trust estate has a right to have that indemnity as a first charge on the trust estate; and the solicitor indirectly gets the benefit of that; but he has not directly any charge on the estate, and any payment he gets out of the estate is only through the right of the trustee, who is his employer, to be indemnified out of the estate. Therefore, the solicitor of the trustee does not stand in any better position as against the trust estate than his client the trustee himself does. If, therefore, the £660 in the hands of the trustee would be ordered to be paid into Court, and the solicitor has received it from the trustee with notice that it is part of the trust estate, he cannot be in any better position than his client would be.

But it was argued that he is in a better position, and the case of *Barnes* v. *Addy* (1) in particular was referred to as supporting that argument. But, instead of shewing that he is in a better

(1) Law Rep. 9 Ch. 244.

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position, it shews the contrary. In that case solicitors had been made parties who had not received any part of the trust estate, excepting in this way, that one of them had received certain small sums as agent for the trustee, in order that he might pay them to somebody else; and he had so paid them. With respect to that the Lord Chancellor pointed out that the solicitor ought not to be made a party to the action; he had not mixed himself up with the breach of trust and he had not received and retained that part of the trust fund. If he had done so the position would have been perfectly different, as Lord *Selborne* points out (1), where he says: "Strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps, of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees;" and again he says (2): "It is said he," the solicitor, is to be charged with the sum in question, "though he did not retain or use for his own benefit a single shilling of that money." Now, if in this case the solicitors had merely received the money and paid it over, acting as agents only, I should not have thought they were liable for it; but, when they have received it and kept it and have it in their own pockets in respect of their own costs, it seems to me they are persons who have received the trust funds with notice of the trust, and that they cannot set up that they have any better right to retain it than the trustee himself. The only serious difficulty I have felt about this matter is whether a claim against the solicitors having this money in their hands as trust money can be enforced on this present application. It seems to me decidedly for their benefit that it should, if it can be done. Moreover I have not had any argument addressed to me on the footing that, assuming they are liable, this is not a proper way of enforcing their liability; and it has not been suggested that if they are liable the parties should be left to some other remedy by way of action, instead of its being enforced on this application. I therefore feel relieved from considering that question.

(1) Law Rep. 9 Ch. 251. (2) Law Rep. 9 Ch. 254.

I must order them to pay the £672 into Court with simple interest at £4 per cent. on the £660.

Solicitors for Applicants: *Bolton, Robbins, Busk, & Co.*, agents for *Hinde, Milne, & Co., Manchester.*

Solicitors for the other beneficiaries: *Cole & Jackson.*

Solicitors for Messrs. *Earle*: *Rooke & Sons*, agents for *Orford, Manchester.*

D. P.

In re OUTLAY ASSURANCE SOCIETY.

Company—Name struck off Register of Joint Stock Companies—Restoration of Name—"Carrying on business or in operation"—Companies Act, 1880 (43 *Vict. c.* 19), *s.* 7.

The power given to the Court, by sub-sect. 5 of sect. 7 of the *Companies Act*, 1880, to restore to the register of joint stock companies the name of a company which has been struck off by the Registrar under the provisions of that section, if the Court is "satisfied that the company was at the time of the striking off carrying on business or in operation," applies to the case of a company which at the time of the striking off was carrying on business only for the purpose of winding-up voluntarily and realising its assets.

Order to restore the name of such a company made, in the form No. 314 given in *Chadwyck-Healey's* Company Law (1).

PETITION, under sect. 7 of the *Companies Act*, 1880, asking for an order that the name of the company might be restored to the register of joint stock companies, from which it had been struck off by the Registrar of Joint Stock Companies under the power conferred on him by sect. 7.

The company was incorporated by registration under the *Companies Acts* in May, 1877. On the 1st of March, 1879, the company passed an extraordinary resolution to wind up voluntarily, and appointed *B. H. Evans*, one of the shareholders, liquidator. From that time the company ceased to carry on any business, except for the purpose of the winding-up. The last annual return made to the Registrar of Joint Stock Companies, as required by sect. 26 of the *Companies Act*, 1862, was made up to the 19th of October, 1878. After the 1st of March, 1879, the company's office was altered from the registered office where the

(1) Page 665.

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business had been carried on, but no notice of this change was given to the Registrar, as required by sect. 40 of the *Companies Act*, 1862.

The liquidator proceeded to realize the assets of the company, and, pending the distribution thereof, he, between December, 1879, and September, 1880, deposited various sums, amounting to £232, with a building society as bankers. The building society afterwards, for some reason, refused to allow the deposit to be withdrawn, and consequently the liquidator was unable to complete the liquidation. In March, 1881, he commenced an action in the name of the company against the building society for the recovery of the deposit with interest, but the action was not set down for trial till the 4th of August, 1886. After this the building society agreed to pay the amount due from them to the company, but they then discovered that the company had been dissolved by a notice in the *London Gazette* of the 1st of June, 1886, which had been inserted by the Registrar of Joint Stock Companies under the provisions of sect. 7 of the Act. He had previously sent to the registered office of the company the notices required by sect. 7, but, in consequence of the change in the company's office not having been communicated to the Registrar, the liquidator had not received these notices, and he knew nothing of the proceedings of the Registrar. The Registrar knew nothing of the voluntary winding-up, there being no provision in the *Companies Acts* requiring the registration of an extraordinary resolution. When the building society discovered that the company had been in this way dissolved, and its name struck off the register of joint stock companies, they refused to pay the amount due from them, unless the name of the company was restored to the register. This petition was accordingly presented by the liquidator to obtain the restoration of the company's name.

The petition stated that the business of the winding-up of the company was in operation at the date of the notice in the *London Gazette* of the 1st of June, 1886.

Leigh Bernard, for the petitioner:—

The power given by sub-sect. 5 of sect. 7 of the *Companies Act*,

1880 (1) applies to the case of a company which is carrying on business only for the purpose of winding-up voluntarily and realizing its assets. The object of the present application is to enable the company to realize its principal asset.

Ingle Joyce, for the Registrar of Joint Stock Companies, did not oppose. He referred to the form of order given in *Chadwyck-Healey's* Company Law (2).

(1) Sect. 7 provides: "(1.) Where the Registrar of Joint Stock Companies has reasonable cause to believe that a company, whether registered before or after the passing of this Act, is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation.

"(2.) If the Registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received by the Registrar, and that if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the *Gazette* with a view to striking the name of the company off the register.

"(3.) If the Registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer thereto, the Registrar may publish in the *Gazette* and send to the company a notice that at the expiration of three months from the date of that notice the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

"(4.) At the expiration of the time mentioned in the notice the Registrar may, unless cause to the contrary is previously shown by such company, strike the name of such company off the register, and shall publish notice thereof in the *Gazette*, and on the publication in the *Gazette* of such last-mentioned notice the company whose name is so struck off shall be dissolved: Provided that the liability (if any) of every director, managing officer, and member of the company shall continue, and may be enforced as if the company had not been dissolved.

"(5.) If any company or member thereof feels aggrieved by the name of such company having been struck off the register in pursuance of this section, the company or member may apply to the superior Court in which the company is liable to be wound up; and such Court, if satisfied that the company was at the time of the striking off carrying on business or in operation, and that it is just so to do, may order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if the name thereof had never been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had never been struck off."

(2) No. 314, p. 665.

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NORTH, J.:—

I see no reason why I should not make an order in that form. There are assets of the company still to be realized, and in a certain sense the business of the company has been going on ever since the resolution to wind up, and an action against their principal debtors has been pending for nearly six years. At any rate the company is still alive, and there are assets to be recovered.

Solicitor for Petitioner: *J. Westcott.*

Solicitor for Registrar: *W. Murton, Solicitor to Board of Trade.*

W. L. C.

NORTH, J. 1887 *Jan.* 24, 25, 26.

In re SAUNDERS-DAVIES. SAUNDERS-DAVIES *v.* SAUNDERS-DAVIES.

[1883 S. 3582.]

Administration of Estate—Payment of Debts—Deficiency of Personal Estate—Abatement—Contribution by Real Estate—Portions charged on Real Estate.

A testator devised his real estate to the use of his wife during her life or widowhood, with remainder to the use of trustees for a term of 500 years, on trust to raise, by mortgage of the real estate or out of the rents and profits, portions of £5000 apiece for each of his younger children, with remainders in strict settlement, the testator's eldest son taking the first life estate. The testator's general personal estate was insufficient for the payment of his debts, and, consequently, the specifically bequeathed personal estate and the real estate had to contribute:—

Held, that, as between the portioners and the persons entitled to the real estate on which they were charged, the former were not bound to contribute to make good the deficiency.

Raikes v. *Boulton* (1) followed.

Long v. *Short* (2) considered and explained.

Held, also, that, as between the real estate and the specifically bequeathed personal estate, the former must contribute in proportion to its full value, not in proportion to its value less the amount of the portions.

THIS action was brought for the administration of the real and personal estate of *A. H. Saunders-Davies*, who died on the 8th of June, 1873. By his will, dated the 7th of May, 1870, he devised all his real estate to the use of his wife and her assigns during her life, if she should so long continue his widow, and, from and after

(1) 29 Beav. 41. (2) 1 P. Wms. 403.

her death or marriage, to the use of two trustees, their executors, administrators, and assigns, for the term of 500 years from the death or marriage again of the wife, and, from and after the expiration or sooner determination of the term, and in the meantime subject thereto and to the trusts thereof, to the use of every son of the testator born in his lifetime or in due time afterwards and his issue, in succession, so that every elder son and his issue might be preferred to every younger son and his issue, and so that every such son might take an estate for his life, with remainder to his first and every subsequent son, successively according to seniority and the order of his birth, in tail general, with remainders over, the ultimate remainder being to the use of the testator's own right heirs for ever.

The trusts of the term of 500 years were to raise, by mortgage or other disposition of the real estate (except a sale), or out of the rents and profits thereof, portions of £5000 apiece for the younger children of the testator living at his death or born in due time afterwards, who being sons should attain twenty-one, or being daughters should attain that age or marry. There was a trust for the trustees of the term to raise out of the rents and profits of the real estate for the maintenance or education of any child for the time being entitled in expectancy to a portion under the trusts of the term, such yearly sums not exceeding the interest of the expectant portion as the trustees shall deem proper; and there was a power for the trustees to raise any sums not exceeding half the portion of any child for the time being entitled in expectancy to a portion, for the advancement, preferment, or benefit of such child, but any sum so raised was to be taken to be in part of the portion of such child in the event of its becoming entitled to a portion. There was also a proviso that any sums advanced by the testator in his lifetime to a child for whom a portion was intended to be provided under the trusts of the term should (unless he should in writing direct to the contrary) be accepted in satisfaction *pro tanto* of the portion. And the testator declared that, immediately after all the trusts of the term should have been fully performed and satisfied, or should have become unnecessary or incapable of taking effect, and the trustees should have been fully reimbursed all costs and expenses (if any) incurred in relation to the trusts,

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the term should (subject and without prejudice to any disposition which should have been made of the premises comprised therein in pursuance of the trusts) absolutely cease and determine. The testator bequeathed certain specific and pecuniary legacies, and he bequeathed all his personal estate and effects to trustees, upon trust for sale and conversion of such parts as should not consist of money, and, out of the proceeds of sale and of the ready money of which the testator should be possessed at his death, the trustees should pay his funeral and testamentary expenses and debts (including mortgage debts) and the legacies (other than specific legacies) bequeathed by his will, and should stand possessed of the residue of the moneys, upon trust to invest the same and to pay the income thereof to his wife, during her life or widowhood, and, subject thereto, in trust for all the testator's children who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares. And the testator appointed his wife sole executrix of his will.

The testator left six children, some of whom were infants.

On the 3rd of August, 1883, an administration judgment was pronounced in the action, by which accounts and inquiries were directed.

The Chief Clerk by the certificate found that the testator's debts (other than mortgage debts) amounted to £19,176, and that his mortgage debts amounted to £8820. His pecuniary legacies amounted to £1425. The general personal estate was insufficient for the payment of his debts. The value of the personal estate specifically bequeathed was £2638; the value of the real estate was £66,858.

This was the further consideration of the action, and the main question to be determined was, whether, for the purpose of making the contribution which the real estate had to make to the payment of the debts, the portions were to abate rateably with the value of the real estate after they were satisfied.

Ainslie, for the Plaintiff.

H. Fellows, for the first tenant for life:—

The portions are specific gifts of real estate, and are liable

to contribute rateably with the interests in the real estate which are subject to them to the payment of debts. All the gifts of the real estate, including that of the portions, are specific, and the burden of contributing to pay the debts is not to be thrown primarily or exclusively on one of them, but must be borne rateably by all parts of the real estate: *Paget* v. *Huish* (1); *Dickin* v. *Edwards* (2); *Page* v. *Leapingwell* (3). The portions may be primary charges on the real estate as between the portioners and the other persons to whom the real estate is given by the will, but they are not entitled to priority as against claims which are outside the will, which were not in the contemplation of the testator. The principle of the cases, as to annuities charged on land, with a devise of the land subject to the annuity, applies: *Long* v. *Short* (4); *Creed* v. *Creed* (5); *Jackson* v. *Hamilton* (6).

The only authority against my contention is *Raikes* v. *Boulton* (7), in which, no doubt, Lord *Romilly*, M.R., held that, as between a portion charged on real estate and the persons to whom the estate was devised subject to the portion, the latter alone were liable to contribute to make good the deficiency of the testator's general personal estate for the payment of his debts. But that case is opposed to the general rule in equity as to contributions for the payment of debts. At that time it was not clearly settled that a residuary devise of real estate is specific. The decision was probably founded on the construction of the words of the particular will, or Lord *Romilly* may have had in his mind *Legh* v. *Legh* (8), though it was not cited to him.

At any rate, if the portions are not to abate, the real estate ought not to contribute to the payment of the debts in the proportion which its full value (including the portions) bears to the specifically bequeathed personalty, but in the proportion which its value, after deducting the portions, bears to the specifically bequeathed personalty.

R. F. Norton, for the trustees of the term:—

The argument against me is based on a fallacy. A gift of

(1) 1 H. & M. 663, 668.
(2) 4 Hare, 273.
(3) 18 Ves. 463.
(4) 1 P. Wms. 403.
(5) 11 Cl. & F. 491.
(6) 3 J. & Lat. 702; 9 Ir. Eq. Rep. 430.
(7) 29 Beav. 41.
(8) 15 Sim. 135.

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the residue of an estate or a fund subject to a specific devise or bequest is not specific as between the specific devisee or legatee and the devisee or legatee of the estate or fund which is subject to it, though it is so for other purposes: *Smith* v. *Fitzgerald* (1). *Long* v. *Short* (2) is not an authority for the proposition for which it is cited; it was only a decision that a devise of a rent-charge out of a term is specific. This clearly appears from the explanation of the case which is given in *Jackson* v. *Hamilton* (3); though in the result Lord Chancellor *Brady* seems to have treated the case as having established a principle which it did not in fact lay down. In *Creed* v. *Creed* (4) Lord *Cottenham* appears not to have considered the previous authorities very carefully; he was clearly mistaken as to the effect of *Davenhill* v. *Fletcher* (5), to which he refers. Nothing was said there about the abatement of the annuity of £100. The decision in *Jackson* v. *Hamilton* (6) may be supported on the ground that the annuity was demonstrative, as in *Mann* v. *Copland* (7). It has always been the practice of conveyancers to treat portions charged by will on land as not liable to abate by reason of the testator's debts; when the portion is to be raised by mortgage or sale of the land inquiry is never made as to the debts. When a pecuniary legacy is given out of a particular fund it must be raised in full (whatever the amount of the fund), unless there is anything to shew that the intention was to give it as an aliquot part of the fund. Otherwise, if the fund is less than the testator supposed it to be, the loss will fall on the person to whom the residue is given: *Petre* v. *Petre* (8); *Vivian* v. *Mortlock* (9); *Booth* v. *Alington* (10). The remaindermen can take nothing till the trusts of the term have been performed, *i.e.*, till the whole £30,000 for portions has been paid. *Raikes* v. *Boulton* (11) is directly in point, and its authority has never been impugned. The portions are reversionary, and the debts must be paid at once; at any rate, the portioners could only be called on to contribute according to the present value of their portions.

(1) 3 V. & B. 2.
(2) 1 P. Wms. 403.
(3) 9 Ir. Rep. Eq. 430, 650.
(4) 11 Cl. & F. 491.
(5) Amb. 244.
(6) 9 Ir. Rep. Eq. 430.
(7) 2 Madd. 223.
(8) 14 Beav. 197.
(9) 21 Beav. 252.
(10) 6 D. M. & G. 613.
(11) 29 Beav. 41.

H. Fellows, in reply :—

Smith v. *Fitzgerald* (1) related to gifts of personal estate. The gift of the portions must be treated as a gift of so much real estate, and every gift of real estate is specific. The gift of the term is a gift of a specific part of the real estate ; it is not the same thing as a charge of the portions on the real estate. When a legacy is given as part of the produce of real estate, the personal estate, though given after payment of debts and legacies, is exempted from the payment of that legacy: *Hancox* v. *Abbey* (2).

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The case of *Raikes* v. *Boulton* (3) has been cited, and it seems to me to be precisely in point, though there were some words in the settlement there which are not to be found here.

It is said that such cases as *Page* v. *Leapingwell* (4) govern this case. In my opinion they do not, because in them the testator was dealing with a fund which was either ascertained, or which he treated as being ascertained. The distinction is very clearly put in *Petre* v. *Petre* (5). In that case Sir *J. Romilly*, M.R., said (6) : "The sole question is, whether the testator intended that all the charges which might possibly fall on the fund he was disposing of should be borne by all the legatees in proportion, or should fall on the residue. The authority of *Page* v. *Leapingwell* applies where the testator disposes of an estate which he assumes will produce a given sum, or with an ascertained fund, in which cases it is indifferent, whether, after he has given certain portions, he specifies the remainder by stating its amount or by comprising it under the term 'residue.' But in this case, so far from knowing the amount of the fund, the testator could have no conception of it; for it was impossible to ascertain the amount until the fund had been realised by a sale, and the charges on it known. If in this case it appeared that the testator thought he was dealing with a sum of £7100 sterling, and he had divided it into different proportions, the loss would then fall on all the persons interested

(1) 3 V. & B. 2.
(2) 11 Ves. 179.
(3) 29 Beav. 41.
(4) 18 Ves. 463.
(5) 14 Beav. 197.
(6) Ibid. 200.

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in proportion to their shares, although the last portion were called 'the residue,' but that is not the case here."

Another case which affords a very good illustration of the rule is *Booth* v. *Alington* (1).

Mr. *Fellows* admitted that *Raikes* v. *Boulton* (2) is very much in point, and that he could not distinguish it, unless the language used in the present testator's will made a difference. But he said that there are other authorities in his favour, and that I ought not to follow *Raikes* v. *Boulton*. The first of such authorities is *Long* v. *Short* (3), which, he suggests, has been treated as establishing the proposition that, where there is a gift of a rent-charge out of an estate, and a gift of the estate subject to the rent-charge, these are two specific dispositions, each of which must abate proportionally for the payment of debts. But that is not the language of Lord Chancellor *Cowper*. He said: "That a devise of a rent-charge out of a term, is as much a specific devise, as if it had been of the term itself." His language has, no doubt, been treated as though he were drawing a comparison between a devise of a rent-charge out of a term, and a devise of the term itself which is subject to the rent-charge. But, looking at the extract from the decree which is set forth in a note to the report, I think what he really decided is reasonably clear. But apart from that note, I will refer to the explanation of *Long* v. *Short* which was given by Lord *St. Leonards* (when Lord Chancellor of *Ireland*) in *Jackson* v. *Hamilton* (4).

In that case a testator had entered into a covenant on his marriage, that in case he should die in the lifetime of his wife without issue, his wife should be entitled to one half of the real and personal property of which he should die possessed. He died without issue in the lifetime of his wife, having by his will devised his real estate, subject to annuities. His widow elected to take against the will, thus taking away exactly one half of the real estate which he had to dispose of. The question arose, whether the annuitants took the whole of their annuities charged on the half of the real estate which was left, or whether the annuities must abate by one half.

(1) 6 D. M. & G. 613.
(2) 29 Beav. 41.
(3) 1 P. Wms. 403.
(4) 3 J. & Lat. 702.

The Master, in answer to inquiries directed by the decree, found that the annuitants and legatees whose annuities and legacies were by the will charged exclusively on the testator's real estates ought to abate by one half thereof respectively, inasmuch as the devisees of the lands charged therewith respectively had been deprived of one half of the lands out of which the testator had directed that those annuities and legacies should be paid, by reason of the widow having elected to take against the will; and he found that the disappointed devisees, annuitants, and legatees were entitled to compensation, out of benefits given to the widow by the will, in proportion to those losses. An exception was taken by the annuitants to the finding of the Master that their annuities should abate. The Lord Chancellor said (1): "*Creed* v. *Creed* (2) was a question of construction; but I do not see how you distinguish this case from *Long* v. *Short* (3). There is no doubt that the gift of an annuity out of real estate alone is a specific devise. In *Long* v. *Short* the annuity was given out of the leasehold, and then the question was, how the bond creditor was to be paid. The Court held that he was to be paid rateably by all the specific devisees; and it was considered that the annuitant was as much a specific devisee as the devisees of the lands. *Long* v. *Short* was denied to be law, but I have acted on it as a binding authority, and it has since been recognised in *England*. In *Long* v. *Short* the assets were not deficient for payment of the bond debt; but all the assets answerable for the debt were specifically given to different persons, and it was held that they were liable to pay it, *pro ratâ*. Is not that the case here? I will reserve my judgment on this point." Upon that I have two remarks to make. In the first place, I have looked at the cases in which Lord *St. Leonards* said that *Long* v. *Short* had been recognised as a binding authority, and it does not appear to me that any of them touch the specific point for which he cited *Long* v. *Short*; and, in the second place, on further investigation he found that the facts of *Long* v. *Short* were not such as they are described in the report, and he then explained what his view was after this investigation. He said (4): "Is the annuity to be cut down to a

(1) 3 J. & Lat. 711.
(2) 11 Cl. & F. 491.
(3) 1 P. Wms. 403.
(4) 3 J. & Lat. 713.

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moiety, and the other moiety to be a charge on the compensation fund?—or is the compensation fund to be added to the moiety which still passes by the will, and the two properties to be subject, in the first instance, to the whole of the annuity? I think this a question of great importance and difficulty. I am not sure that the case of *Long* v. *Short* (1), which was relied upon against the annuitant, is an authority against him. It appears to be so, as stated in the text of *Peere Williams*; for the gift is stated as having been of a rent-charge out of the term for years to one grandson, and of the lease itself to another grandson; and this is the way in which the case is stated by Lord *Cottenham*, in the passage quoted at the bar from *Creed* v. *Creed* (2), in the House of Lords; but the extract from the Registrar's book shews that the gift of the chattels at *Shillingford* and *St. George* was to his daughter *Joan*; and the gift of the annuities was to *Benjamin Short* and *Agnes Dyer*, out of his chattel estates at *Kenn*. The annuities were for life; and the testator gave to *Agnes Dyer* the house and garden in *Kenn*, wherein he lately lived. There were, I apprehend, other estates in *Kenn*; and it was probably considered that the house and garden given to *Agnes Dyer* were not subject to the annuities. The other chattels in *Kenn*, if there were any, fell into the residue, and were disposed of in the payment of the debts, in exoneration of the annuitants and other specific devisees. I think it desirable that a copy of the will, and a statement of the testator's estates in *Kenn*, should be obtained from the Registrar's book in *England*." That was afterwards obtained, and an abstract of the proceedings in *Long* v. *Short* is given in a note to *Jackson* v. *Hamilton* (3).

From that note it appears that the chattels in *Kenn* on which the annuities were charged were different from the house and garden specifically bequeathed, and must have been entirely exhausted before the annuitants could be called upon to abate at all. And the point decided in *Long* v. *Short* was "merely that, the specific legatee of an annuity charged on a specific chattel, part of the general personal estate, shall abate rateably with specific legatees of other chattels real."

(1) 1 P. Wms. 403. (2) 11 Cl. & F. 491.
(3) 9 Ir. Eq. Rep. 650.

Before final judgment was given on the point raised in *Jackson* v. *Hamilton* (1), Lord *St. Leonards* had ceased to be Lord Chancellor of *Ireland*, and the judgment was given by Lord Chancellor *Brady*.

Before adverting to what he said, let me refer to *Creed* v. *Creed* (2). The passage relied on in that case was a statement by Lord *Cottenham* (3), in which, after speaking of gifts of annuities as being pecuniary legacies, he said: "This rule, however, has no application to the gift of a rent-charge or annuity issuing out of land; for that is an interest in the land itself, and necessarily specific. The very case occurred in *Long* v. *Short* (4), in which there was a devise of a rent-charge out of a leasehold property to *A.*, and a devise of the leasehold itself to *B.*, and of fee simple land to *C.*; and it was held that the devise of the rent-charge was as much a specific devise as if it had been of the term itself, and therefore that all three should contribute rateably to the payment of specialty debts. The same point was assumed in the case of *Davenhill* v. *Fletcher* (5): £100 per annum was given to the testator's wife, to be paid out of a freehold estate, and £500, which, together with the annuity, was to be in full of dower and thirds. A question was made whether under the provision, upon a deficiency of assets, the £500 should abate; but no such question was made as to the annuity."

On that I have two remarks to make. The fuller investigation of *Long* v. *Short* shews that Lord *Cottenham's* description of it as a devise of the leasehold itself on which the annuity was charged was erroneous. But the proposition in support of which he cited *Long* v. *Short* is not touched at all. Then Lord *Cottenham* said that in *Davenhill* v. *Fletcher* the same point was assumed. The mere fact, however, that a point was not argued when it might have been argued is not of much importance. But if *Davenhill* v. *Fletcher* be looked at carefully it will be seen that the point was not assumed; the very opposite was assumed. In that case a testator gave his wife for life an annuity of £100 a year to be paid out of a certain freehold estate: he also gave

(1) 3 J. & Lat. 702; 9 Ir. Eq. Rep. 430.
(2) 11 Cl. & F. 491.
(3) 11 Cl. & F. 508.
(4) 1 P. Wms. 403.
(5) Amb. 244.

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her £500, which together with the annuity he declared to be in full for her dower or thirds out of his real or personal estate. On a deficiency of assets it was held that the legacy of £500 to the wife should not abate with the other legacies; and instead of its being assumed that the £100 must abate it was not even suggested by any one that it should abate. The reason why it was decided that the £500 should not abate would be *à fortiori* a reason why the annuity should not abate. Then *Jackson* v. *Hamilton* came afterwards before Lord Chancellor *Brady* (1); and the Lord Chancellor said (2): "The case of *Long* v. *Short* (3), as reported in *Peere Williams*, undoubtedly appears to be exactly this case; because it is there stated that there was a charge of the annuity on a chattel interest, and the same chattel interest was bequeathed to a third person, and the decree, as reported, makes those parties respectively abate in proportion to their respective interests, as they took the chattel affected by a common charge on the whole property. It turns out that there is a mistake in the report. The annuity was granted out of the chattel interest, but the residue of it appears not to have been specifically disposed of, and was thus exhaustible by the debts as general personal estate. The appropriation of the general personal estate was not sufficient to pay the debts, and therefore they came on the specific gifts of the fee simple and chattel interests. That, therefore, so far as it is of value, forms a distinction between that case and this. But it does not appear that *Long* v. *Short* has ever been looked on in so narrow a view."

He then refers to the passage from the judgment of Lord *Cottenham* in *Creed* v. *Creed* (4) which I have read, and continues: "He there gives the case of *Long* v. *Short*, as reported in *Peere Williams*, not controverting the accuracy of the report, but citing it as a case establishing this principle, and manifestly as a case meeting his entire concurrence. Therefore, on the authority of *Long* v. *Short*, or rather on the authority of the principle of it, as it appears to have been understood and dealt with, I do not see any reason to distinguish this case in principle from the general class of cases I have adverted to. The case then resolves itself into

(1) 9 Ir. Eq. Rep. 430.
(2) Ibid. 438.
(3) 1 P. Wms. 403.
(4) 11 Cl. & F. 491.

the question, whether the true construction of this will makes any difference? If the intention was to give to the annuitants their annuities at all events, and if the testator meant to declare that the person entitled to the estate should in no case detract from the annuities, that might support the distinction taken; but I can find nothing in this will to lead me to such a conclusion. The annuities are given to persons by name. It does not appear from the will whether there was any particular reason why they should be objects of the testator's bounty more than the other legatee, who was to take the *corpus* of the estate. There is nothing in the will indicating a reason for such a preference. There is no contract expressed or implied—such as existed in some of the cases, where the gift was to a widow in lieu of dower, and it was held that it was not liable to abate, as it was matter in the nature of contract between her and the testator. There is nothing of that sort in this case, nor, as I have said, is any intention fairly to be collected from the words used. The words merely amount to this: 'I give my estate to *A.*, subject to an annuity to *B.*' They shew that what the testator intended was to give the entire proceeds of the estate subject to the entire annuity. But how can I assume that he meant to give the whole annuity, and not the whole of the estate—to give nothing to the person to whom he devises the *corpus* of the estate until the annuity was provided for, even though the estate should be exhausted by incumbrances of his own creation? Such a presumption would be against all equity; it would be unsupported by any authority, and would be against the principle of *Long* v. *Short* (1). I therefore concur with the Master, and think that the annuities should abate, and share the common fate of the property on which they are charged."

Now the question is, what is the true construction of the will in the present case? It appears to me, that though the language is not precisely the same as that of the will in *Raikes* v. *Boulton* (2), yet the result is exactly the same. In the present case, assuming that there was no debt in question, the trustees might, if they pleased, impound the rents and profits of the estate and retain the whole of them to provide for the portions.

(1) 1 P. Wms. 403. (2) 29 Beav. 41.

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There is another distinction between the portions and the land settled subject to them. The portions are given absolutely; the estate subject to them is given in strict settlement. Further, in the present case it is clear that the portions of £5000 each were not fixed with regard in any way to the value of the property on which they are charged; they are unvarying sums of £5000, whatever the value of the property might be. It might be that the testator would acquire a considerable increase of property. It might be that the value of the property charged would rise. It might become building land, or in some other way that which is sometimes called an "unearned increment" might accrue. The total amount charged might diminish by reason of some of the children dying. In each of those cases the persons entitled to the real estate would alone gain. Then, on the other hand, the number of the persons entitled to portions might increase, or the value of the property charged might diminish through agricultural depression, or for some other reason. If the value of the property had diminished considerably, there would have been a very small amount for those entitled to it after satisfying the portions. Then the value of the property charged might have been altered by the testator making a disposition of part of it during his lifetime; he might have sold a portion of it to pay debts. He might have made advances to a portioner; and, if the advance had exceeded £5000, the person entitled to the settled estate would have been prejudiced. If the testator had incurred large debts, (as in fact he did,) and a creditor had obtained judgment against him and had issued execution and procured a sale of some of the real estate, the shares of the portioners would have remained unaltered. And it seems to me that there is a strong analogy in the general law by which, under *Locke King's Act*, real estate charged with mortgages has to bear the charge after the death of the mortgagor. In the present case the mortgage debts amount to nearly £9000. It is true that the general law does not apply, for the testator has expressly excluded the application of *Locke King's Act*. But, assuming that he had not done so, it seems to me clear that the burthen of paying off the mortgages would have had to be borne by the real estate alone, without any contribution from the portions, and that the

persons entitled to the portions would have received the whole of them. No authority to the contrary has been cited, and as I am not aware of any, I take it for granted that none exists.

This therefore, is not a case in which all the children of the testator take similar benefits of different amounts, but subject to the same incidents. The younger children are, to the limited extent of their portions, preferred to the son taking the devised estates. The case is like *Raikes* v. *Boulton* (1) and quite outside the decision in *Jackson* v. *Hamilton* (2); and, under the circumstances, it appears to me that no contribution to the debts can be thrown upon the portioners. I therefore follow *Raikes* v. *Boulton*, and hold that the portions must be raised without any abatement in respect of the contribution which the real estate has to make to the payment of the testator's debts.

As between the real estate and the specifically bequeathed personalty the real estate must contribute in proportion to its value as found by the certificate, without any deduction in respect of the portions.

Solicitors for all Parties: *Cookson, Wainewright, & Pennington.*

W. L. C.

In re ROLLASON. ROLLASON *v.* ROLLASON.

HALSE'S CLAIM.

[1884 R. 2456.]

Pawnbroker—Redeemable Pledges—Judgment—Execution.

A pawnbroker's interest in redeemable pledges may be taken in execution under a *fi. fa.*

THE Defendant in this action was sued as the executrix of her deceased husband, a pawnbroker. Judgment was given on trial for the Plaintiff on the 21st of July, 1886, for £100 interest and costs. On the 19th of November, 1886, a writ of *fi. fa.* was issued for the amount of taxed costs. Execution was levied on the

(1) 29 Beav. 41. (2) 9 Ir. Eq. Rep. 430.

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20th of November, 1886, and the sheriff seized, *inter alia*, redeemable pledges received in the business of the deceased.

One *Twist* obtained judgment against the Defendant in an action in the Queen's Bench Division on a money claim against the Defendant to this action in respect of her deceased husband's business. A receiver of the business of the deceased was appointed in the Queen's Bench action, subject to his giving security. His appointment was perfected by his giving security on the 25th of November, 1886. The receiver served notice on the sheriff that he claimed the redeemable pledges.

This was an interpleader summons on the part of the sheriff.

Macaskie, for the sheriff.

H. Tindal Atkinson, for the receiver:—

A pawnbroker, so far as the redeemable pledges are concerned, is in no higher position than one who has a lien on the property in pledge; he has no saleable interest in the property (35 & 36 Vict. c. 93, ss. 12, 16), and therefore the pledges cannot be taken by the sheriff: *Legg* v. *Evans* (1); *Squire* v. *Huetson* (2); *Chitty's Archbold's* Queen's Bench Practice (3).

McClymont, for the Plaintiff:—

The pledges are securities within 1 & 2 Vict. c. 110, s. 12, and therefore seizable.

[NORTH, J.:—I think that applies to bills and notes and securities of the nature of those expressly mentioned in the section.]

I do not press that point. A pawnbroker's interest in redeemable pledges is not a lien: therefore the case of *Legg* v. *Evans* does not apply. On the contrary, the pawnbroker's interest is alienable: *Halliday* v. *Holgate* (4); *Mores* v. *Conham* (5); *Story* on Bailments (6); therefore it is seizable, and that was taken to be so in *Squire* v. *Huetson*.

H. Tindal Atkinson, in reply.

(1) 6 M. & W. 36.
(2) 1 Q. B. 308.
(3) 14th Ed. p. 856.
(4) Law Rep. 3 Ex. 299.
(5) Owen's Rep. 123.
(6) § 324.

NORTH, J.:—

The sheriff took possession on the 20th of November of the premises connected with the business carried on by the Defendant. On the 25th the receiver, under a judgment obtained in another action, perfected his security; and would have been entitled to take possession of the assets on the premises if all prior claims were out of the way. A prior claim in the way was the claim of the sheriff. The sheriff, having seized, had taken possession, amongst other things, of a number of goods in pledge: in which, therefore, the pawnbroker had a qualified property. As to some of the pledges, more than twelve months and a week had expired and some of the goods were irredeemable. As to others less than twelve months had expired. It is conceded that the sheriff could not be compelled to go out of possession of those articles which had been pledged for more than twelve months. It is admitted that he is entitled to remain in possession of the other goods also unless the appointment of the receiver has intercepted his rights. It is not disputed that if they remain in his possession until the time for redemption expires, the sheriff will have an interest in the property. It is clear to me that the sheriff has in the meantime also an interest in the goods; which are held as security for the money advanced on them, and to secure which the goods were pledged. When I say it is a security, I do not think it is within 1 & 2 Vict. c. 110, s. 12, which, I think, means only securities *ejusdem generis*, as the securities particularly mentioned in the section. And I doubt whether the section can be held to apply to goods in pledge. But independently of that, the sheriff has a right to the possession of the goods in respect of the qualified property the pawnbroker has in them: and he has a right to sell them when the twelve months and a week shall have expired, and to make a good title to any one to whom he sells, and has a right to receive the money; and in respect of the redeemable pledges it appears to me the appointment of the receiver has not intercepted his right; and the sheriff has a right to hold the goods by way of deposit, and they cannot be redeemed except by payment of the money secured by the pawners, and the person for whom the sheriff holds the goods is entitled to any money paid for redemption.

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As there are no facts in dispute, under Order LVII., rule 9, I can deal with the matter at once, without directing an issue, and declare that the receiver is not entitled to the pledges.

Solicitors: *Taylor, Hoare, Taylor & Box*, agents for *R. C. Heath, Warwick*; *Pilcher & Vertue*, agents for *Unett, Page & Fisher, Birmingham*; *Belfrage & Co.*, agents for *J. W. Robinson, Birmingham.*

D. P.

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Jan. 29.

COOKES *v.* COOKES.

[1859 C. 249.]
[1885 C. 2034.]

Settled Land—Sale by Tenant for Life—Payment of Purchase-money into Court—Payment out to Trustees—Option of Tenant for Life—Power of Trustees to give Receipts—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 22 (*sub-ss.* 1, 2, 3), 40.

In 1859 a suit was instituted for the administration of the estate of a testator, who had devised land in strict settlement. In 1886 the tenant for life sold the land under the provisions of the *Settled Land Act*. Trustees had previously been appointed by the Court for the purposes of the Act. The purchaser refused to complete his contract, unless the purchase-money was paid into Court, and an order was made on his application, with the consent of the tenant for life, giving him liberty to pay it in, and it was paid in accordingly:—

Held, that, by consenting to the order for payment of the purchase-money into Court, the tenant for life had exercised the option, given to him by sub-sect. 1 of sect. 22 of the Act, of having the money paid either to the trustees of the settlement or into Court, and that the money could not, therefore, be paid out to the trustees, but must remain in Court, and be invested or applied under the direction of the Court.

Semble, that the power to give receipts, which is conferred on trustees by sect. 40 of the Act, extends to trustees appointed by the Court under sect. 38.

PETITION for (*inter alia*) the payment out of Court of money representing the purchase-money of settled land, which had been sold by the tenant for life under the *Settled Land Act*, 1882.

The suit was instituted in 1859 in the Court of Chancery, for the administration of the real and personal estate of *Denham J. J. Cookes*, by whose will the land was settled.

J. Russell Cookes was the tenant for life in possession of the estate, with remainder to his first and other sons successively in tail male; with remainder to *H. Winford Cookes* for his life; with remainder to his first and other sons in tail male. *J. Russell Cookes* had no sons, and *H. Winford Cookes* had never been married. The ultimate remainder was not disposed of by the will, and was vested in the testator's heir-at-law. By an order made on the 11th of August, 1885, on the application of *J. Russell Cookes*, trustees were appointed of the settlement created by the will for the purposes of the *Settled Land Act*. On the 30th of April, 1886, *J. Russell Cookes*, as tenant for life, contracted to sell the settled estates to *J. J. Jones* for £85,000, subject to certain mortgages. By an order, dated the 9th of June, 1886, made in the suit and in the matter of the *Settled Land Act*, on the application of the purchaser and with the consent of the tenant for life, it was ordered that the purchaser should be at liberty out of the purchase-money to pay off the mortgage debts and certain costs, and to pay into Court to the credit of the suit, "purchase-money of *Astley* estate on sale under the *Settled Land Acts*," the remainder of the purchase-money, amounting to £35,929, and the amount of the valuation of the timber on the estate. The timber was afterwards valued at £12,000, and £47,929 was accordingly paid into Court by the purchaser.

The order for payment into Court was obtained, because the purchaser had refused to complete his contract, unless the money was paid into Court. The estate having been conveyed to the purchaser, *J. Russell Cookes* presented this petition, asking (*inter alia*) that the balance of the money in Court (after making certain payments out of it) might be paid out to the trustees who had been appointed by the Court.

Cookson, Q.C., and *Rashleigh*, for the petition:—

Under sub-sect. 1 of sect. 22 (1) of the *Settled Land Act*, 1882, the

(1) Sect. 21 provides that "Capital money arising under this Act . . . . shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes, namely (*inter alia*): (ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge."

By sect. 22 "(1) Capital money arising under this Act shall, in order

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tenant for life is entitled, if he wishes it, to have the money paid out to the trustees. The heir-at-law is not entitled to any voice in the matter.

[NORTH, J.:—Has not the tenant for life already exercised the option given to him, by consenting to the order for payment of the money into Court?]

He did not choose the payment into Court; all that he did was not to resist it. The purchaser insisted on it, and declined otherwise to complete his purchase. There were a number of necessary parties to the conveyance, and it was desirable that the money should be producing interest while their concurrence was being obtained. The option given by the Act still exists; there was nothing more than an *interim* exercise of it. If the money remains in Court, and it is desired to invest it on mortgage, great expense will be caused in the investigation of title by the Conveyancing Counsel of the Court. The trustees can, under sect. 40, give an absolute discharge for the money, and, indeed, they may be said to be persons "becoming absolutely entitled," within sub-sect. ix. of sect. 21. Sect. 40 applies to trustees appointed by the Court under sect. 38 to be trustees under the settlement for the purposes of the Act. Under sect. 69 of the *Lands Clauses Consolidation Act* the Court has ordered the purchase-money of land taken by railway companies to be paid

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to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly.

"(2) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and, in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

"(3) The investment or other application under the direction of the Court shall be made on the application of the tenant for life, or of the trustees."

By sect. 40 "The receipt in writing of the trustees of a settlement . . . . for any money or securities, paid or transferred to the trustees . . . . effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof."

out to trustees of a settlement, appointed by the Court under the *Settled Land Act*, as being parties "becoming absolutely entitled": *In re Wright's Trusts* (1); *In re Harrop's Trusts* (2).

Napier Higgins, Q.C., and *Speed*, Q.C., for the tenant for life in remainder.

Cozens-Hardy, Q.C., and *T. L. Wilkinson*, for the heir-at-law:—

The money ought to be retained under the control of the Court, for investment under its direction. The tenant for life has exercised the option given to him by sect. 22, by consenting to the order for the payment of the money into Court. He might have insisted on its being paid to the trustees. As it is, sub-sect. 3 of sect. 22 applies. It would be quite contrary to the ordinary practice of the Court to pay out such a large sum to trustees without seeing to the investment of it. Sub-sect. ix. of sect. 21 has no application.

Ingle Joyce, for the trustees.

Dauney, for the purchaser.

Cookson, in reply.

NORTH, J. (after referring to sect. 22 of the Act, and stating the facts, continued):—

In my opinion the payment into Court was made "at the option" of the tenant for life. The purchaser would not complete, unless the money was paid into Court. Whether he could have maintained his refusal to complete is a matter which I cannot deal with at present; but, as I understand it, in order to avoid the non-completion, the tenant for life either chose, or acquiesced in, or consented to, the payment into Court. It seems to me, therefore, that he has exercised the option conferred on him by sect. 22, because he had the right to say, if he pleased, that the money should not be paid into Court, but should be invested or applied by the trustees. It is quite true it may have been that he acquiesced in, or selected, the mode of payment into

(1) 24 Ch. D. 662. (2) 24 Ch. D. 717.

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Court, because there were some questions about the application of the money. But, the order for payment into Court on the application of the purchaser having been made with his consent, he appearing and being party to it, there seems to me to have been an exercise of his option to have the money paid into Court, instead of an insisting on his right to have it paid to the trustees out of Court.

Then the 2nd and 3rd sub-sects. of sect. 22 provide for the two alternatives—the application of the money when it has been received by the trustees, and its application under the direction of the Court after it has come into Court. Sub-sect. 2, therefore, does not apply to the present case.

What, then, ought I to do with this large sum of money? I am asked to pay it out to the trustees, and it is said that under sect. 40 of the Act they have power to give a receipt for it. I think it is quite clear that the trustees appointed by the Court under the Act would have had full power to give a receipt for the money if it had been paid to them, and the sale had been completed out of Court, and the tenant for life had exercised his option of having it paid to the trustees and invested or applied by them; but it seems to me that sect. 40 does not apply to the actual alternative of the money coming into Court. Then it is said that the money having come into Court it may be invested or applied in one or more of the ways pointed out in sect. 21, and it is said that one of those ways is "in payment to any person becoming absolutely entitled or empowered to give an absolute discharge." It is urged that, under the similar words of sect. 69 of the *Lands Clauses Consolidation Act*, under the power given by that section to pay money out to parties "becoming absolutely entitled," money has been paid out to trustees who would hold it upon the trusts of a settlement, and I am asked to hold by analogy that sub-sect. 9 of sect. 21 enables me to direct payment out in the same way. I do not think it does, because the investment or application of this particular money is to be made under the direction of the Court, and it does not seem to me that the money would be invested or applied under the direction of the Court if it was paid out absolutely to trustees, in order that they might invest or apply

it without any direction of the Court. It is not necessary to put such a construction on sub-sect. 9 of sect. 21, because there are many cases in which there might be a payment to "any person becoming absolutely entitled or empowered to give an absolute discharge" without referring to such a case as the present. In my opinion sect. 40 does not apply to sect. 22, sub-sect. 3; the power which it confers on trustees to give receipts applies to the case of a payment to them under sect. 22, sub-sect. 2, but not to the case of payment into Court under sub-sect. 3. It is not suggested that there is any difficulty about paying the money out to the trustees except the legal difficulty, which I do not see how I can get over. Looking at the general scope of the Act, and the evident intention to give the trustees of a settlement and the tenant for life together such very large powers as are undoubtedly given to them by the Act as a whole, it may well be that, if the Legislature had considered this particular case, they would have directed that money in Court under sect. 22, sub-sect. 3, might be paid out of Court to the trustees, but I do not find that the language they have used does contain such a direction. The provision that, when the money has been paid into Court, it shall be invested or applied under the direction of the Court, seems to me inconsistent with paying it out to the trustees, in order that they may invest or apply it, at their own discretion, without any direction of the Court.

Solicitors for Petitioner and Trustees: *Gregory, Rowcliffes, & Co.*
Solicitors for other parties: *Tucker & Lake; Lidiard & Co.*
Solicitors for Purchaser: *Clarke, Woodcock, & Ryland.*

W. L. C.

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1887

Feb. 2.

In re HERBERT.

Solicitor—Common Order to tax—Retainer.

The question of retainer can be raised on a common order to tax as to particular items or heads; but not as to the whole of a bill of costs.

A bill of costs was divided into general costs and costs relating to a particular matter. On a common order to tax:—

Held, that the whole of the latter, except two small items, having been incurred without authority were properly taxed off.

THIS was a summons by a solicitor to review the certificate of a Taxing Master made on a common order to tax. The clients who had obtained the order for taxation were trustees of a settlement. The bill delivered consisted of two parts: one relating to general costs of the trust estate, amounting to £25 2*s.* 9*d.*; the other relating to a particular matter (styled "the *Willesden* security") amounting to £23 2*s.*

Objection was taken before the Taxing Master to the whole of the costs relating to the particular matter that there had been no retainer. The objection was withdrawn as to two items of 10*s.* each. The Taxing Master allowed the objection as to all the other items relating to the particular matter.

The solicitor objected to the taxation, partly "because the Master had not jurisdiction to enter into the question of retainer as regards the *Willesden* security." The answer of the Master to that objection was, "a client to whom a bill of costs has been delivered by his solicitor, and who obtains a common order to tax it, cannot object to the whole bill, but can object to part of it having been incurred without or contrary to his directions, and the Taxing Master has entertained the question."

R. G. Glenn, for the summons:—

If the question of retainer can be raised on a common order to tax as to items of a bill of costs, it cannot be raised as to the whole bill, or as to what is substantially the whole bill. Here the bill, so far as it relates to the *Willesden* security, is in effect a separate bill. It matters not that it was not put on a separate

piece of paper, and the allowance of the small items is illusory, and will not give the Taxing Master jurisdiction: *In re Thurgood* (1); *In re Inderwick* (2).

Herbert Reed, for the clients, was not called on.

NORTH, J.:—

It appears that when the matter came before the Taxing Master an objection was taken to all the items in the second head, on the ground that there was no retainer. I am told by counsel for the solicitor that the Taxing Master asked if the first two items were disputed; the objection was withdrawn as to these two items, and they were allowed: all the rest were struck out on the ground of there being no retainer. Now it is said that it was not open to the parties to dispute the retainer, they having obtained a common order to tax. It is not open to them to dispute the retainer as to the whole bill, but it is to do so as to any particular items or as to any head of charges. That practice is perfectly clear; it was settled long ago in the case of *In re Bracey* (3). In that case a bill of costs consisted of four distinct classes of items, and in respect of such classes was divided into four distinct parts: a general bill of costs, plaintiff's costs in suit, defendant *Meyrick's* costs in suit, and defendant *Otway's* costs in suit. The petitioners admitted their liability to pay the bills which were incurred upon the retainer of Mr. *Meyrick*, but did not admit their liability to pay the plaintiff's costs of suit or the defendant *Otway's*. The only question on the hearing of the petition was, whether the Taxing Master would take into consideration the question of liability or retainer on the common order; and it was held that the Master could entertain the question; and that, therefore, the special petition was unnecessary, and the petitioner must pay the costs of it.

That case has been constantly followed since, and I have not the slightest doubt about that being the rule.

Solicitors: *F. S. Herbert & Co.; W. Furse Neave.*

(1) 19 Beav. 541. (2) 25 Ch. D. 279.
(3) 8 Beav. 266.

D. P.

NORTH, J.

1887

Feb. 2.

IMBERT-TERRY *v.* CARVER.

[1886 I. 882.]

Practice—Rules of Supreme Court, 1883, *Order* III., *r.* 6; *Order* XIV., *r.* 1—*Writ specially indorsed—Summary Judgment.*

A writ which claims foreclosure or sale and a receiver, besides payment of the debt and interest, is not specially indorsed so as to entitle the plaintiff to summary judgment on the claim for debt and interest.

THIS was a mortgagees' action. The writ was indorsed with a claim—(1.) To have an account of what was due on a mortgage for £8000, and that the mortgage might be enforced by foreclosure or sale; (2.) The appointment of a receiver; (3.) And also a claim for "£8000 for principal and interest due under the covenants for payment of principal and interest contained in the said mortgage, the particulars of which are as follows." The particulars were given below.

The Plaintiffs took out a summons under Order XIV., rule 1, that they might be at liberty to sign final judgment in this action for the amount indorsed on the writ therein, with interest, if any, and costs to be taxed.

Cookson, Q.C., and *Edwards*, for the Plaintiffs:—

The object of the new practice in enabling a mortgagee to pursue both his equitable remedy by sale or foreclosure and his legal remedy for debt in one action, is to prevent circuity and expense. The Court, therefore, will not put a construction on the rules which practically prevents him from joining claims on both his remedies in one action: *Farrer* v. *Lacy, Hartland & Co.* (1). The reasonable construction of Order III., rule 6, is that a writ may be specially indorsed for the purpose of procuring speedy judgment under Order XIV., rule 1, though there is another claim. The case of *Bissett* v. *Jones* (2) affords a strong analogy for this construction.

George Henderson, for the Defendant:—

The Plaintiffs can only apply under Order XIV., rule 1, where

(1) 31 Ch. D. 42. (2) 32 Ch. D. 635.

the writ is specially indorsed under Order III., rule 6, that is, where it is indorsed with a claim only for a liquidated demand, including, no doubt, interest; but here the claim extends also to a mortgagee's ordinary equitable relief. To grant the order asked would be to act not only contrary to the express words of the rule, but also contrary to the decision of the Court: *Hill* v. *Sidebottom* (1).

The decision of *Bissett* v. *Jones* (2) has no application, for the defendant did not appear, and the motion was made under Order XIII., rule 3, which applies to a case where the writ is indorsed specially or otherwise.

Cookson, in reply.

NORTH, J.:—

The Plaintiffs now apply for immediate judgment directing payment of the money demand. They can only do that if the writ is specially indorsed within Order III., rule 6. The point raised by the Defendant is that the rule does not include a writ indorsed with a claim of something in addition to a debt or liquidated demand, and, therefore, the indorsement is not such a special indorsement as to entitle the Plaintiffs to proceed under Order XIV., rule 1. The words of Order III., rule 6, are, "In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest," &c., the writ may be specially indorsed.

Is this a case in which the Plaintiffs seek only to recover a debt or liquidated demand? They seek to recover that and something else. That is my clear view of the meaning of the section. It does not rest there. There is an express decision by Lord Justice *Fry* in *Hill* v. *Sidebottom* to the same effect, in 1882. It is suggested that there is a later decision to the contrary in *Bissett* v. *Jones;* but that is not a conflicting decision at all. It is under a different rule. The distinction was pointed out by counsel, and referred to by the Judge. That was under Order XIII., rule 3. That rule says that, where the writ of summons is indorsed for a liquidated demand, "whether specially or

(1) 47 L. T. (N.S.) 224. (2) 32 Ch. D. 635.

NORTH, J. 1887 IMBERT-TERRY v. CARVER.

otherwise," and the defendant fail to appear, the plaintiff may enter final judgment. The words are quite distinct. It is clear that *Bissett* v. *Jones* (1) in no way conflicts with the decision of Lord Justice *Fry*. Under these circumstances, I consider the Plaintiffs not entitled to summary judgment, and I dismiss the summons.

Solicitors: *Angell, Imbert-Terry, & Page; Futvoye, Field, & Baker.*

D. P.

NORTH, J. 1887 *Feb.* 10.

In re WILCOCK.

[1885 W. 2534.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 38—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 31—*New Trustee.*

One of two trustees appointed under sect. 38 of the *Settled Land Act*, 1882, desired to retire. The Court appointed a new trustee for the purposes of the *Settled Land Acts* in the place of the retiring trustee on an application made under that section:—

Quære, whether sect. 31 of the *Conveyancing Act*, 1881, applies to trustees appointed for the purposes of the *Settled Land Acts*.

By an order made on an originating summons in the matter of the will of *David Wilcock*, and in the matter of the *Settled Land Acts*, 1882, 1884, on the 12th of August, 1885, the Court appointed *James Butterfield Dewhirst* and *Hannah Beatrice Dewhirst* trustees for the purposes of the *Settled Land Acts*, 1882, 1884, of a moiety of land settled by the will of *David Wilcock*, deceased. Persons had become absolutely entitled to the other moiety. A portion of the settled land was sold, and a moiety of the net purchase-money was placed on a deposit account in the names of *James Butterfield Dewhirst* and *Hannah Beatrice Dewhirst.*

This was a summons to have *Mary Lucilla Dewhirst* appointed trustee in the place of *Hannah Beatrice Dewhirst*, for the purposes of the *Settled Land Acts*, 1882, 1884, to act as such trustee conjointly with the said *James Butterfield Dewhirst*. *Hannah Beatrice* desired to retire on account of ill health.

(1) 32 Ch. D. 635.

The Chief Clerk considered that the Court ought not to appoint a new trustee in the place of a retiring trustee under the *Settled Land Act*, 1882, but that the continuing trustee ought to appoint under sect. 31 of the *Conveyancing Act*, 1881.

Theodore Ribton, for the Applicants (the tenant for life and all persons of full age entitled in remainder, including the trustees):—

The office of trustee for the purposes of the *Settled Land Acts* is an office *sui generis*, the creature of the Act of 1882; it is not the subject of sect. 31 of the *Conveyancing Act*, 1881. The power of the Court to appoint trustees for the purposes of the *Settled Land Acts* is not exhausted by having been exercised; the Court having power to appoint trustees originally, has, as an incident to that power, the same powers, in extent, with regard to removing and substituting trustees for that purpose as it has with regard to other trustees and officers it has power to appoint. It is proper to point out to the Court that a difficulty may be suggested, in that there is no direction in the Act as to vesting trust property in new trustees corresponding to sub-sect. 4 of the 31st section of the *Conveyancing Act*, 1881.

NORTH, J.:—

The matter has been adjourned into Court because of the difficulty felt by the Chief Clerk, who thought that it was not necessary under the *Settled Land Act* to apply to the Court for the appointment of a new trustee, and that the continuing trustee could appoint a new trustee under the *Conveyancing Act*, 1881: and his view is supported by a passage in the notes to Mr. *Wolstenholme's* edition of the *Settled Land Act* (1): "When trustees have been once appointed by the Court they become trustees of the settlement for the purposes of the Act, and like other trustees so appointed have, under the *Conveyancing Act*, 1881, s. 31, power to appoint new trustees." That passage is quite enough to justify the Chief Clerk's hesitation in making the order on the summons. I am very unwilling to say anything to throw doubt on the validity of appointments already made; and it is not necessary

(1) 2nd Ed. p. 54.

NORTH, J. 1887 *In re* WILCOCK.

for me to say that new trustees could not be appointed under sect. 31 of the *Conveyancing Act*, 1881, for the purposes of the *Settled Land Act*. But I think it very doubtful, to say the least, whether a valid appointment can be made under that section. The Act says that the trustees appointed by the Court shall "for the purposes of this Act" become and be trustees of the settlement: and the Act in question contains no power of appointing new trustees except by the Court. I certainly consider an application to the Court under sect. 38 of the *Settled Land Act* is justified, and the appointment can and ought to be made by the Court; for in appointing trustees who are to act by way of a check on the tenant for life, the Court is always careful to be satisfied for itself that those persons are suitable persons to discharge such duties. Under the circumstances I shall make the order asked for, and I feel no difficulty in doing so. It has been suggested by Mr. *Ribton* that a doubt might possibly be felt from the fact that the section of the *Conveyancing Act* relating to the appointment of new trustees, provides by sub-sect. 4 that "on an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done," and there is no corresponding provision in the *Settled Land Act;* and therefore it is suggested that new trustees for the purposes of the *Settled Land Acts* must be appointed under the power conferred by the *Conveyancing Act*, for if not, there is no direction that the trust property should be conveyed to the new trustees. I do not feel pressed with that objection. When the Court does appoint a new trustee, it takes care that the property shall be vested in the new body of trustees. I shall add to the order a direction that the trust funds shall be transferred to the continuing and new trustee.

Solicitor: *S. H. Behrend.*

D. P.

NORTH, J.
1887
Feb. 9, 14.

In re SEYTON.
SEYTON *v.* SATTERTHWAITE.

[1886 S. 4570.]

Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *s.* 10—*Policy of Life Assurance — Construction — "Wife and Children" — Tenancy in Common.*

A policy was taken out on the life of the assured for the benefit of his wife and children:—

Held, that his widow and children took as joint tenants.

In re Mellor's Policy Trusts (1) explained.

In re Adam's Policy Trusts (2) dissented from.

THIS was an originating summons to determine the rights of the widow and children of *Charles Smith Seyton*, deceased, in a sum of £4000 insured on his life, by himself, in the *Scottish Provident Institution*. The policy recited that he was "desirous of assuring his life under the provisions of the *Married Women's Property Act*, 1870, for the benefit of his wife Mrs. *Susan Amelia Preston Goddard*, or *Seyton*, and of the children of their marriage." It certified that "under the provisions of the Act first herein mentioned his said wife Mrs. *Susan Amelia Preston Goddard*, or *Seyton*, and the children of their marriage, whom failing the heirs, administrators or assigns of the said *Charles Smith Seyton*, shall be entitled to receive out of the funds of the said institution at the end of six months after the decease of the said *Charles Smith Seyton*, the sum of £4000."

Charles Smith Seyton died on the 1st of April, 1886. There were issue of the marriage seven children; one died before the policy was effected, another died an infant in the lifetime of the assured, a third died shortly after his death under age. The other four were all under age and were Defendants to this summons.

The widow, the Plaintiff in this summons, was sole executrix of her husband and devisee and legatee of all his estate, and testamentary guardian of her children.

(1) 7 Ch. D. 200. (2) 23 Ch. D. 525.

NORTH, J.
1887
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By an order dated the 10th of July, 1886, trustees of the policy were appointed, and the money receivable on the policy was paid to their credit.

G. A. Watson, for the widow:—

The law as settled by the last case, *In re Adam's Policy Trusts* (1), before *Chitty*, J., is that where the policy does not define the exact trusts, and there is no other instrument doing so, the Act is to be read into the policy, and the effect is that the wife takes a life interest in the whole, with remainder to her children. In *In re Mellor's Policy Trusts* (2), Vice-Chancellor *Malins* came to the same conclusion on other grounds, but when the matter came before him on a second occasion, he thought that the trust being executory he had power to mould it, and, it being more beneficial for the parties, he directed the money to be applied as if there had been an intestacy (3). If the correct view be that the trust is executory, the proper settlement to make is to give the widow a life interest with remainder to the children: *In re Bellasis' Trust* (4).

Amedroz, for the children and trustees:—

It is difficult to follow the reasons given for the decision in *In re Adam's Policy Trusts*. There is in the first place no reason to read the Act into the policy; to which, unless there is another instrument declaring the trust, you must look to see the intention of the settlor, and the policy must be construed by the same rules as a will is construed. In the next place, it seems to have been thought by Vice-Chancellor *Malins*, in *In re Mellor's Policy Trusts*, that the fact that the wife's interest is to be for her separate use is to be taken into account in coming to the proper construction of the trust, but it is equally consistent with a life interest or a tenancy in common. Upon that point the case of *In re Bellasis' Trust* is of little value, for the point really never arose on the facts. In the report of *French* v. *French* (5) there are some words which make it appear that the reason for

(1) 23 Ch. D. 525.
(2) 6 Ch. D. 127.
(3) 7 Ch. D. 200.
(4) Law Rep. 12 Eq. 218.
(5) 11 Sim. 257.

the decision that the interests were successive is, that the gift over was for the separate use of the testator's daughters, which is inconsistent with the previous decision of the same Judge in the same volume, *De Witte* v. *De Witte* (1), where the gift is also to a daughter for her separate use, and the children of that daughter. There was another good reason also for the decision in *French* v. *French* (2), namely, that in the particular case the after-born children would be cut out if there was a joint tenancy. The rule is that a gift to a parent and the children of the parent creates a joint tenancy, except there are circumstances to make a different construction more reasonable. *De Witte* v. *De Witte*, *Newill* v. *Newill* (3), and *Bustard* v. *Saunders* (4), are cases where the rule was applied; such cases as *In re Bellasis' Trust* (5) and *French* v. *French* are exceptions that prove the rule.

G. A. Watson, in reply.

NORTH, J.:—

I am now asked to declare what are the interests of the widow and children in the policy moneys: whether the widow is tenant for life with remainder to the children; or whether the widow and children take as joint tenants. I may say at the outset that I think it clear that, whatever the children take, they take as joint tenants *inter se*, and that the child who died in 1874 may be disregarded. The fact that the policy was an immediate declaration of trust would not prevent the children born subsequently to its date, but before the trust fund came into existence, taking as joint tenants with those already born: see *M'Gregor* v. *M'Gregor* (6) and the authorities there referred to. The child who died after her father's death may also be disregarded, as her interest clearly survived to her mother and sisters or her sisters alone.

Looking at the words of the policy in the present case, I think it clear that according to its true construction considered alone, the mother and children take as joint tenants. The case of

(1) 11 Sim. 41.
(2) Ibid. 257.
(3) Law Rep. 7 Ch. 253.
(4) 7 Beav. 92.
(5) Law Rep. 12 Eq. 218.
(6) 1 D. F. & J. 63.

NORTH, J.
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In re SEYTON.
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Newill v. *Newill* (1) seems to me conclusive on that point. It is quite true, as there pointed out, that the Court has often taken hold of slight circumstances, in the case of a gift to a wife and children, as sufficient to indicate that the wife is to take for life with remainder to her children; but I find no such indication in the present policy. In the case of *In re Adam's Policy Trusts* (2) Mr. Justice *Chitty* took the same view of the construction of a policy indistinguishable from the present, but in that case (which it should be mentioned was an *ex parte* application with respect to a sum of £200 only) the learned Judge expressed an opinion, without deciding the point, that the Act and policy, taken together, constituted a declaration of an executed trust, and that all that the Court had to do was to express its view of the two instruments so taken together. I have great difficulty in following this view. It is very important to see what the Act authorizes to be done; but then it is to the policy itself, and not to the Act, that one would look to find what the assured intended. The Act does accordingly say that a policy effected by a married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use and of his children or any of them, according to the interest so expressed. The Act does therefore, as might be expected, refer to the policy itself for the expression of what the benefit intended is. It may be that if a policy expressed to be under the Act is capable of two constructions, one within and the other not within the powers of the Act, the former might be considered by the light of the Act to be the true construction; but beyond this I think that the policy alone must be looked at, and that its construction is not affected by the language of the Act.

But even if the Act and policy are to be read together as one declaration of trust, I am unable to assent to the view that the wife takes the whole fund for life, with remainder to her children. It cannot be doubted, I think, that if the trust expressed on the face of the policy was "for the benefit of my wife and our children as joint tenants;" or if it was "for the benefit of my wife for life,

(1) Law Rep. 7 Ch. 253. (2) 23 Ch. D. 525.

with remainder to our children," each would be equally within the Act, and would be a good declaration of trust; and if each of those constructions of the words, "for the benefit of my wife and our children," is equally within the Act, I do not see how the Act can supply reasons for preferring one construction rather than the other.

One of the reasons which led Mr. Justice *Chitty* to the view he took in *In re Adam's Policy Trusts* (1) was that the benefit to the wife was expressed in the Act to be for her separate use. I do not see how that throws any light upon the point under consideration; if those words were added to each of the phrases I have just mentioned, this would be wholly ineffectual to alter their construction. Again, to refer to the authorities on wills, I am unable to find any case in which the mere direction in a gift to a parent and children, that the interest of the parent should be for her separate use, has been held sufficient in itself without more to warrant the construction that the parent takes for life with remainder to the children. In the cases of *De Witte* v. *De Witte* (2), *Bustard* v. *Saunders* (3), and *Fisher* v. *Webster* (4), it was held that the mother and children took as joint tenants, although the mother took for her separate use. In the cases of *Froggatt* v. *Wardell* (5), *French* v. *French* (6), and *Jeffery* v. *De Vitre* (7), there was a trust for the separate use of the parent, and she was held to take for life, with remainder to her children. But the reason in each case obviously was because the testator intended all the children of the parent to take: an intention which would have failed if the parent and children living at the testator's death had taken immediate vested interests as joint tenants, and other children had been subsequently born. In *Bain* v. *Lescher* (8) the reason for the judgment is not given; but the form of the gift quite explains the conclusion that a settlement was meant, without supposing that the Vice-Chancellor intended to depart from the view he expressed in *De Witte* v. *De Witte* a few months before. In cases like the present—of policies effected by a man

(1) 23 Ch. D. 525.
(2) 11 Sim. 41.
(3) 7 Beav. 92.
(4) Law Rep. 14 Eq. 283.
(5) 3 De G. & Sm. 685.
(6) 11 Sim. 257.
(7) 24 Beav. 296.
(8) 11 Sim. 397.

NORTH, J.
1887
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on his wife and children under the Act in question—it is obvious that the children must always be *in esse* when the fund comes into existence on the death of the assured.

But another consideration arises on the face of the Act itself. Sect. 10 provides that a woman may effect a policy on the life of her husband for her separate use: such separate use will operate not merely during the interval between her husband's death and the time when she receives the money, but at any subsequent time if she marries again, and the capital fund or any part of it remains undisposed of. Again, under the same section a man may effect a policy for the benefit of his wife, which is to enure for her separate use, and the same result follows—the fund is absolutely her own, protected from any subsequent husband. But the same section also provides that the policy may be for the benefit of the settlor's wife and children or any of them; and I cannot see anything in the Act to indicate that in such case the separate use should not attach to the share of the widow in the policy moneys, whether it be a life interest or a portion of the capital, just as it would have attached to the whole capital if the widow alone had been the object of the trust. I cannot agree in the view that if the widow takes as joint tenant the words, "for her separate use," have no meaning.

The same section (10) also provides for the appointment of trustees. But in my opinion that does not in any way indicate that the policy moneys are to be held on a continuing trust; though it contemplates a possibility that it might be so. It merely provides machinery by which an assurance company may get a valid discharge, without having to see to the execution of the trust. In the present case the appointment of trustees is necessary by reason of the infancy of the children, whatever be the construction of the policy.

The Act of 1882 was also referred to, but I do not see what it has to do with this case; both Acts provide for a policy for the benefit of the widow, either alone, or jointly with all or any of the settlor's children. The second Act goes further, and provides also for a policy for the benefit of all or any of the children of the settlor, without making provision for a wife. It is quite true to say that the Legislature here contemplates that the interests

of wife and children may possibly not be concurrent: but this is very different from saying that under a gift for the benefit of a wife and children they are not to take concurrent interests, a proposition for which I do not find any foundation.

For these reasons I come to the conclusion that, whether the policy be considered alone or jointly with the Act, it amounts to a settlement on the wife and children by creating vested interests as joint tenants in such of them as were living at the settlor's death.

Independently of my own view upon the case, I find a decision of Vice-Chancellor *Malins* precisely in point, *In re Mellor's Policy Trusts* (1), the report of which apparently has been misunderstood. There was no respondent to the petition; the petitioners were the widow and the two children. When the case came before the Court on the first occasion it was put by counsel that the policy did not contain any declaration of trust of the beneficial interest, and that this defect must be supplied by treating the trust as executory, and either directing a settlement of the trust fund, or distributing it upon some fancied analogy to a distribution under the statute in case of intestacy. The Vice-Chancellor pointed out that it was not a case of intestacy, but apparently thought he had power to direct a settlement of the fund. On the second occasion he was asked to reconsider his decision, and saw his way to a different conclusion; and he held, as I do, that the reference in sect. 10 to the wife's interest being for her separate use did not prevent her taking a share of capital. The learned counsel seems to have relied again on the *Statute of Distributions*, and to have confused the mind of the reporter thereby; but the Vice-Chancellor said nothing about the statute. He modified his order that there must be a settlement on the wife for life, with remainder to the two children, and held that they could all share in the capital. They must, therefore, all have taken like third shares; which are the exact proportions they would have taken in any fund as to which there had been an intestacy. I have no doubt that some remarks by the Vice-Chancellor to that effect, referring to the argument urged before him, are summarised by the reporter in the final words, "that the money might be distributed

(1) 6 Ch. D. 127; 7 Ch. D. 200.

NORTH, J. 1887 *In re* SEYTON. SEYTON *v.* SATTERTHWAITE.

as in the case of an intestacy." The report is not, however, a satisfactory one. In this present case I declare that the Plaintiff and the infant Defendants are entitled to the policy moneys as joint tenants, and direct the trustees to raise thereout and pay the costs of all parties, to be taxed as between solicitor and client.

Solicitors for all parties: *Bowman & Crawley-Boevey.*

D. P.

NORTH, J. 1887 *Feb.* 17.

In re KNIGHT. KNIGHT *v.* BURGESS.

[1885 K. 1206.]

Will—Construction—Misdescription—Lease.

A testator gave the lease of the house in which he should be living at the time of his decease to his wife. At the date of the will he was living in a house he held for a short term at rack-rent; he subsequently bought and went to reside at a freehold house, where he died:—

Held, that the freehold house was not devised to the testator's widow.

THIS was an originating summons relating to the estate of *John Hellett Knight*, deceased, for, among other purposes, the determination of the question whether a freehold house passed under the following passage in his will:—"I give all the plate, linen, china, glass, wines, liquors, furniture, and other household effects which shall be in and about the dwelling-house in which I shall reside at the time of my decease, together with the lease of such house, and also my park phaeton, to my wife *Sarah* absolutely."

The will was dated the 27th of June, 1878. At that time the testator, who was a butcher at *Burslem*, was residing at a private house, No. 154, *Liverpool Road, Burslem*. He held an underlease of that house for a term of seven years from the 23rd of December, 1877, at rack-rent, viz. the yearly rent of £33 10*s*. He continued to reside at No. 154, *Liverpool Road* till the summer of 1884, when he sublet the house for the remainder of the term. In May, 1884, he purchased a freehold house with three roods of land at *Porthill, Wolstanton*, near *Burslem*, subject to a rent-charge.

The house at *Porthill* was conveyed to him in June, 1884. He went to reside there, and died there on the 17th of November, 1884.

The Plaintiff was *Sarah Knight*, his widow, the sole acting executrix and a trustee of his will. The Defendants were the testator's two sons by a former wife, who were his residuary devisees and legatees, and two trustees, appointed by the Court trustees of the will, as co-trustees with the Plaintiff.

Cookson, Q.C., and *Vernon Smith*, for the widow:—

This comes within the class of cases where a testator has given his interest in a property, and the interest in the property has changed between the date of his will and the time of his death. In such cases, whatever interest the testator had when he died has been held to pass. *Saxton* v. *Saxton* (1) is a good example. It was a case in which the testator gave his term and interest in a leasehold house, and he afterwards purchased the reversion. The mere fact that the value of the interest has increased ought not to affect the question. If the testator had purchased a long leasehold at a peppercorn rent, no question would have arisen. A freehold interest is practically the same as a long leasehold at a nominal rent. In this case the property is subject to a rent.

Samuel Hall, for one, and *Ingle Joyce*, for the other, of the two residuary devisees:—

The testator contemplated giving his wife only an interest like in kind to that he had at the date of his will. The case is nearer to that of *In re Portal and Lamb* (2) than *Saxton* v. *Saxton*: in the former case a devise of "my cottage and all my land at *S.*," coupled with a condition to keep them "in their present state," was held not to pass after-acquired land at *S.* Even had the testator the freehold interest in his dwelling-house at the time he made the will, and continued to reside there, the fee could not have passed: *Waters* v. *Wood* (3). In that case a gift of policies in certain insurance companies did not pass shares in those companies, though the testator had no policies.

(1) 13 Ch. D. 359. (2) 30 Ch. D. 50.
(3) 5 De G. & Sm. 717.

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This is not like the cases in which a testator has adopted words that can be taken as sufficient to describe all his interest, whatever it may be, in a property he may have at his death. This is the very case put by Vice-Chancellor *Giffard* in *Cox* v. *Bennett* (1), where the language is "equivalent to saying 'I give the leasehold interest,' and nothing else."

Emden, for trustees.

Vernon Smith, in reply.

NORTH, J.:—

The question is, what passes by the words "lease of such house"? The testator was living at his death in a house of which there was not any lease, therefore it cannot be said that the words taken strictly pass anything. I am not going to be bound by the exact words used, if by the context it is shewn that the words do not aptly describe what the testator intended; if, looking at the rest of the passage, or at that coupled with other parts of the will, it appeared that something else was intended, I should give effect to the intention, and not to the strict words.

To understand the language of the testator I must put myself in his position and look at the surrounding circumstances. At the date of the will the testator had recently taken a lease of No. 152, *Liverpool Road*, which commenced at Christmas, 1877. It was a lease for seven years, subject to rent and covenants, and was at rack-rent; it came to an end at Christmas, 1884. Near the end of the term—in May, 1884—he purchased a freehold house about a mile distant. He went to reside there in June, and four or five months afterwards he died. During the interval between his leaving the house in *Liverpool Road* and the expiration of the term the old house was let to a sub-tenant. Now it is clear that the gift of the plate, linen, china, glass, and other effects in and about the house at which he should reside at the time of his death, passed all the plate and effects at *Porthill*, and the park phaeton, if it was not worn out. The lease is merely

(1) Law Rep. 6 Eq. 422, 426.

referred to among other chattels of small value; and I am satisfied that the testator was merely referring to some such interest as he had at the time; and that there was no intention on his part to give the fee simple in a house, which he did not purchase till many years after the date of his will. It is said that if what he had acquired had been a long leasehold house where he resided, the widow would have taken that, and there was no distinction practically between a long leasehold at a peppercorn rent and a fee simple. There is just this distinction: the one comes within the description in the will, and the other does not. If he had had a long lease he could have bequeathed a lease, and it might have been necessary to give effect to the words he had used. But the words used do not aptly describe the interest he really had, and as far as I can make out he had not the remotest idea when he used them of passing the fee simple in a house he did not possess. I find that neither the letter nor the spirit of the will is in the widow's favour, and therefore hold that the Plaintiff is not entitled.

Solicitors for the Plaintiff and Defendant trustees: *G. H. Carthew*, agent for *Arthur Ellis, Burslem; John Burton*, agent for *Tomkinson & Furnival, Burslem.*

Solicitors for the two residuary devisees: *Howard & Shelton*, agents for *Julian, Burslem.*

D. P.

NORTH, J.

1887

Jan. 21;
Feb. 4.

In re DARLINGTON FORGE COMPANY.

Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25 [*Revised Ed. Statutes vol. xv., p.* 628]—*Paid-up Shares—Rectification of Register.*

The members of a firm sold their assets to a company formed for the purpose under a verbal contract. All the shares in the company were issued to the partners or their nominees. The shares were issued as paid up to the extent of the purchase-money. After the lapse of fourteen years the Court, on being satisfied that all debts were provided for, rectified the register of members, by striking out the names of all the shareholders; and directing the issue of new shares, after a proper agreement had been executed and filed under the *Companies Act*, 1867, sect. 25.

THE *Darlington Forge Company, Limited*, was registered in August, 1873. The memorandum of association of the company defined its objects as the carrying on at *Darlington* and elsewhere the business of steel and iron manufacturers and forgers; and the acquisition for the above purposes (under a provisional arrangement already entered into by the promoters of the company) of the business and business premises, works, land, stock in trade, machinery, and plant of the co-partnership firm of "*Darlington Forge Company*" of *Darlington*, and the doing of all such other things as are incidental or conducive to the attainment of the above objects. The capital of the company was fixed at £77,000 in £100 shares.

A clause in one of the articles relating to the powers of directors recited: "The company having purchased the entire interest of co-partnership firm of *Darlington Forge Company*, in the business now or hitherto carried on by them at their works in *Darlington*, together with all their stock-in-trade, machinery, plant, goodwill, and credits, for the sum of £44,120 8*s.*, and having also purchased from the said firm all their foundries, works, land, and business premises in *Darlington* aforesaid for the sum of £15,939 12*s.* (making together the sum of £60,060)," and authorized the carrying out of such purchase and the payment of the purchase-money and costs. Another clause of the same article authorized the adoption of contracts already entered into and the payment for the acquisition of any property by the articles authorized to be acquired either in cash or in shares of the company.

The whole of the 770 shares of the company were subscribed for at the foot of the memorandum of association by eight signatories who were either members of the co-partnership firm of the *Darlington Forge Company* or their nominees. The shares were allotted to the subscribers as having £78 paid up on each share (making in all £60,060, the amount of the agreed price).

No contract for the issue of the shares had been filed under the provisions of sect. 25 of the *Companies Act*, 1867. In fact no contract in writing, other than the memorandum of association, had been made in respect of their issue. There were two entries relating to the establishment of the company in the books of the co-partnership, one dated the 31st of March, 1872, of a resolution passed at a meeting of the partners, "that the present firm be converted into a limited liability company, arrangements to be at once made for carrying out the same. The new company to date from the 1st of July, 1872. The capital of the company to be £77,000 consisting of 770 shares of £100 each. That *John Cowans* and his nominee have 210 shares; that *E. P. Sheldon* have the same; that *Thomas Bouch* have the same; that *William Putman* have 140 shares." The second entry was of a resolution dated the 22nd of July, 1873: "Agreed that the paid-up capital of the company be £78 per share. That the difference in capital be paid to the old partners in two payments, namely, September 1st and March 1st next. That the new company date from July 1st, 1873." At the foot of this minute were appended the numbers of shares intended to be and afterwards allotted to each subscriber, and the names of the intended directors, who became the first directors.

The assets taken over by the company from the co-partnership having been valued at a sum considerably in excess of £60,060, the balance was credited by the company to the four partners in the old firm upon the basis of an adjustment of their several accounts as members of the old firm.

The present members of the company were with one exception either original members or the legal personal representatives of original members.

This was a motion on the part of all the members that the register of members of the company might be rectified by

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striking out their names, and that an agreement should be forthwith executed between the company and the Applicants shewing the arrangements under which the company purchased the assets of the co-partnership and the circumstances under which the Applicants became entitled to the shares as paid up to the extent of £78 per share, and were now entitled to receive new shares; that the agreement should be filed, and new shares issued to the Applicants.

There was an affidavit by one of the directors, a member of the old firm, deposing as follows:—

"The solicitor who acted for the company is dead, and the shareholders have recently been advised that a contract embodying the terms of the aforesaid sale and issue of shares partly paid up should have been executed by the vendors and the company, and should have been registered with the Registrar of Joint Stock Companies prior to the issue of the said shares.

"Speaking positively for myself, and to the best of my knowledge and belief for the said *John Cowans*, *Edward Pattison Sheldon*, *Thomas Bouch*, *William Bouch*, and *John Sheldon*, the first directors of the company, we left all matters connected with the said sale in the hands of the company's solicitor to see the transaction properly carried out, and I always believed, and I am certain that all the other persons interested believed that everything had been done which was necessary for our protection in every possible event."

Cozens-Hardy, Q.C., and *Edward Beaumont*, for the Applicants:—

Though the facts of this case are not precisely the same as in other cases in which a rectification of the register has been made where a contract has not been duly filed through ignorance or mistake, there is nothing to prevent the Court relieving against an innocent mistake: *In re Foreign and Colonial Gas Company* (1); *In re New Zealand Kapanga Gold Mining Company* (2); *In re Denton Colliery Company* (3); *In re Droitwich Salt Company* (4); *In re Dublin and Wicklow Manure Company* (5); the peculiarity

(1) 22 W. R. 766.
(2) Law Rep. 18 Eq. 17, n.
(3) Law Rep. 18 Eq. 16.
(4) 22 W. R. 767.
(5) 13 L. R. Ir. 198.

in this case is that no contract ever was signed that could be registered. They appear to have left everything to their solicitor to protect them, and were ignorant that all proper formalities had not been complied with. If it can be said that the mistake occurred through their ignorance of law, that may render it more difficult to rectify the matter, but it does not render it impossible. There is no difficulty about debts: the company has no permanent debts; if necessary a fund can be provided to cover current debts.

[NORTH, J.:—The Applicants have a remedy in their own hands; they can wind up voluntarily and reconstitute themselves.]

Cozens-Hardy:—That is a course practically out of consideration. The general public would not understand the matter, and it might affect the credit of the company.

[NORTH, J.:—The fact that the Legislature has provided a roundabout method of doing what is asked may not prevent the Court doing it in a more simple way.]

Chadwyck Healey, for the company.

NORTH, J.:—

I felt a great difficulty at first in acceding to the present application because the object sought could be perfectly attained, as far as technical difficulties are concerned, by a winding-up order and reconstruction. But there are obvious reasons why it is not to the advantage of those interested in the property of the company that such steps should be taken. The present application is evidently perfectly honest, and I think I see my way to do what is asked, subject to two things being done. In the first place the existing debts must be provided for—I do not say paid, that might be impossible, but a sufficient amount must be secured to cover the existing debts. Then, in the next place, I ought to see the agreement that it is proposed should be filed by the Registrar of Joint Stock Companies. And the matter must stand over for the purpose of those two things being done, and the matter can be mentioned to me at any time.

The difficulty suggested by Lord *Selborne* in *In re New Zealand*

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Kapanga Gold Mining Company (1) as to the want of ignorance of the allottees is one that might be formidable in some cases. I do not find any case in which it was treated as not being a difficulty. In the case of *In re Denton Colliery Company* (2) no doubt satisfactory evidence was produced as to that. In the case in *Ireland*, *In re Dublin and Wicklow Manure Company* (3), it does not appear that any of the persons had known that the contract was not filed; it was quite consistent with the report that they should have been ignorant that it was not. In the present case it seems to me that all parties agreed to leave to the solicitor the carrying out of all steps proper to perfect their scheme and were not aware that any precaution had been omitted; and I feel that no harm can be done in allowing the names of the applicants to be taken off the register of shareholders, and restored after a proper contract has been filed. In so doing I am not ignoring any decision or dictum of any Judge; and not seeing that any persons can be prejudiced thereby, I am prepared to accede to the application on the two conditions I have mentioned being complied with.

Feb. 4. This matter was mentioned to-day.

There was evidence that the unpaid debts of the company up to the 31st of January, 1887, were £2389 19*s.* 3*d.*, and the probable additional debts to be incurred by the 7th of February were not more than £490, and that a sum sufficient to pay the whole amount had been lodged in a bank in the name of *William Barclay Peat*, a trustee to provide for such debts.

An agreement dated the 1st of February, 1887, had been executed between the company of the first part, the various shareholders of the second to the tenth parts, and *William Barclay Peat* of the eleventh part. The agreement recited the formation of the company; that the company had agreed to buy the assets of the old firm for £60,060, and that instead of paying cash the company agreed to issue shares partly paid up; that the company took possession of the property of the firm and issued shares in payment; that no agreement for the issue of the shares had been filed, or in fact made in writing; that the

(1) Law Rep. 18 Eq. 17, n. (2) Law Rep. 18 Eq. 16.
(3) 13 L. R. Ir. 198.

parties of the second to the tenth parts were the present shareholders; that a sum of money had been placed in the name of *W. Barclay Peat* to provide for the debts of the company; that the members had applied to the company for the cancellation of the existing shares, and the issue of the new shares, and the company had agreed to do so on the sanction of the Court being obtained; that the members had delivered the certificates of their shares to the company, and that this application was pending. It was agreed that the existing shares (specifically described by reference to a schedule) should be cancelled. 2. That the agreement should be filed with the Registrar of Joint Stock Companies. 3. That immediately after the cancellation of the existing shares and the filing of the agreement the company would issue to the Applicants new shares specifically described by reference to another schedule of the nominal amount of £100 with £78 paid up on each. 4. That *William Barclay Peat* should hold the sum placed in his name on trust to pay the existing debts of that company, and satisfy all liabilities that should be incurred by the company before the sanction of the Court could be obtained, and hold the balance in trust for the company; and lastly, that the agreement should be void unless it should be sanctioned by the Court within six calendar months from its date, or some other order obtained to the like effect. The two schedules were alike except in the numbers attached to the shares.

NORTH, J.:—I am content that the order should now be made.

Cozens-Hardy:—There may be thought to be a difficulty in directing immediate cancellation of all the shares, because it may be thought that if the directors' shares are cancelled, there will be no power to re-issue shares: possibly the right course to pursue would be to cancel, in the first instance, all the shares, except the directors' qualifying shares.

NORTH, J.:—I do not think there will be any difficulty; the new shares will be issued under the seal of the company.

Solicitors: *Munns & Longden.*

D. P.

NORTH, J.

1887

Jan. 12, 17, 18; *Feb.* 7.

In re LEA.
LEA *v.* COOKE.

[1885 L. 605.]

Charitable Bequest—Scheme.

The property of a religious unincorporated society was under the absolute control of the general superintendent. A testator bequeathed legacies to "General *W. B.*" (who was the general superintendent) "for the spread of the gospel":—

Held, that the legacies should be paid to *W. B.* without a scheme.

THIS was an action to administer the estate of *William Lea*, deceased, and to have the trusts of his will and two codicils carried into execution.

The testator, by his first codicil, gave his wife an annuity of £500 a year, and a pecuniary legacy in lieu of benefits given by his will; he gave pecuniary legacies to several persons beneficially, and the codicils contained the following bequests:—"I bequeath to my friend Mr. *George Muller*, of the *Orphan House, Bristol*, the sum of £5000, for the benefit of the orphans in that institution, and I give and bequeath to *General William Booth* the sum of £4000 for the spread of the gospel. I devise and bequeath the sum of £8000 to be invested at the discretion of my trustees in any way they deem most prudent, to be by them held in trust to pay the interest or annual income derived therefrom to my niece *Elizabeth Rogers* for her life, and at her decease to divide the whole of the said principal money, as to one moiety thereof to pay the same to the Reverend *C. H. Spurgeon*, of *London*, and Mr. *George Muller*, of *Bristol*, for the benefit of their orphanage, and as to the other moiety of the said sum of £8000, to pay the same to the said *General William Booth*, for the spread of the gospel: and I also give and bequeath, and direct my trustees to pay any balance of my clear yearly income which shall remain in their hands after making provision for my dear wife's annuity, and the various pecuniary legacies left by my said will and this codicil, as to the fifty per cent. thereof to the said *General William Booth* for the spread of the gospel, and as

to the other fifty per cent. thereof, to the said *George Muller* for his orphanage at *Bristol*, and the principal yielding such balance of income at the decease of my said wife will then fall into the residue of my said estate and pass by my will."

By his second codicil the testator reduced the bequest to *George Muller*, from £5000 to £2000.

By his will the testator had given five pecuniary legacies to the several treasurers for the time being of five several charities, in each case for the general purposes of the charity.

The action came on on further consideration. A question raised was whether the proportion of the legacies bequeathed to *General William Booth* "for the spread of the gospel" that could be legally paid for charitable objects was to be paid to him, or whether a scheme ought to be directed for the application of the funds "for the spread of the gospel."

In July, 1883, the testator sent to *General William Booth* a sum of £5 to be appropriated to the most needy case. Subsequently to his first codicil he sent a contribution to the general purposes and a contribution to an extraordinary relief fund.

There was evidence that the *Salvation Army* was originally formed by *William Booth*, the legatee, under the name of "*The Christian Mission.*" He executed a deed-poll, dated the 7th of August, 1878, which was enrolled in the Chancery Division of the High Court. By the deed the objects and tenets of the society were declared.

The deed recited that the said *William Booth* commenced preaching in a tent in 1865; that a number of people were formed into a community or society by the said *William Booth* for the purpose of enjoying religious fellowship, and in order to continue and multiply such efforts as had been made in the tent to bring under the gospel those who were not in the habit of attending any place of worship by preaching and by holding other religious services and meetings; that the society was united with others under the name of "*The Christian Mission;*" that the object of the deed was to render valid and effectual trusts in respect of buildings and property already given and thereafter to be given for the purposes of the society, to remove doubts and prevent litigation as to the terms therein, "to ascertain what is the

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name or title and what are and shall be for ever the doctrines of the said *Christian Mission*, and also in order to preserve the system of the said *Christian Mission* generally by means of a general superintendent." It was witnessed, first, that the name of the society had during the last nine years been called "*The Christian Mission;*" secondly, that eleven articles of faith set out were and should for ever be the religious doctrines of the society; thirdly, that the said *Christian Mission* "is and shall be always hereafter under the oversight, direction, and control of some one person who shall be the general superintendent thereof, whose duty it shall be to determine and enforce the discipline and laws and superintend the operations of the said *Christian Mission* and to conserve the same to and for the objects and purposes for which it was first originated."

"The general superintendent shall have power to expend on behalf of the *Christian Mission* all moneys contributed for the general purposes of the said *Christian Mission* or for any of the special objects or operations thereof, but he shall annually publish a balance sheet (duly audited) of all such receipts and expenditure."

"The general superintendent shall have power to acquire by gift, purchase, or otherwise, any hall or meeting-house, school-room, vestry, land, building and appurtenances, and any seats, fittings, furniture or other property whatsoever which may in his judgment be required for the purposes of the said *Christian Mission*, and to build upon such land or alter or pull down any such buildings, and to hire on lease or otherwise, any land or buildings, and to lend, give away, let, sell, or otherwise dispose of any such property, land or buildings as he may deem necessary in the interests of the said *Christian Mission*, wherein all trustees shall render him any assistance, and he may, in all such cases he shall deem it expedient so to do, nominate and appoint trustees or a trustee of any part or parts respectively of such property, and direct the conveyance or transfer thereof to such trustees or trustee, with power for the general superintendent to declare the trusts thereof, and from time to time, if it shall deem expedient to him so to do, revoke any such trusts or the appointment of such trustees or trustee, and upon such revocation the same property

shall be conveyed or transferred to such persons or person, and upon such trusts as he may direct, but only for the benefit of the said *Christian Mission*."

The other clauses of the operative part of the deed related to the appointment of successors in the office of general superintendent.

Since the date of the deed the designation "*Salvation Army*" had practically superseded the term "*Christian Mission*."

Rigby, Q.C., and *Renshaw*, Q.C., for *General Booth*:—

It cannot be contended that a gift "for the spread of the gospel" is not a good charitable bequest: *Clifford* v. *Francis* (1); *Anon.* (2); *Powerscourt* v. *Powerscourt* (3). This latter case is also an authority to shew that, where there is a charitable legacy entrusted to the discretion of a person for objects not of a permanent nature, no scheme will be directed. *Waldo* v. *Caley* (4) shews that, at any rate, as to the overplus income, there can be no scheme. It also shews that the fact of absolute discretion being vested in the legatee is a reason for not directing a scheme. *Horde* v. *Earl of Suffolk* (5) was another case in which no scheme was directed, on the ground of there being a discretion in the legatee. In *Society for the Propagation of the Gospel* v. *Attorney-General* (6), where there was a gift to a corporation for the settlement of bishops in two projected sees, no scheme was directed. In *Walsh* v. *Gladstone* (7) there was a legacy to *A. B.*, to be applied for the benefit of a Catholic college. *A. B.* was dead, and the Court ordered the legacy to be paid to the president of the college, whose position was, with regard to the college, similar to that of *General Booth* towards the *Salvation Army*, that is to say, he had absolute discretion as to the application of funds. *Wellbeloved* v. *Jones* (8) also recognises that where there is a pecuniary legacy to an officer of a charitable institution, though not a corporation, for the general purposes of the institution, no scheme will be directed.

(1) Free. Ch. 330.
(2) Ibid. 40.
(3) 1 Moll. 616.
(4) 16 Ves. 206.
(5) 2 My. & K. 59.
(6) 3 Russ. 142.
(7) 1 Ph. 290.
(8) 1 S. & S. 40.

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In this case there are gifts to the chief officer of a well-established society, evidently intended to be at his discretion as to how they are to be applied, to be applied for the very purposes for which the society exists, and not intended necessarily to be for a permanent object, therefore there is no case for a scheme. Full accounts of the subscriptions to the *Salvation Army* and of the expenditure of them are published every year. The method in which the work of the society is done has received the approval of the testator. The body is one of a permanent nature, and *General Booth* is a permanent officer, who by the constitution of the society is autocratic as to the receipt and disposition of its funds, though he renders full accounts.

Ingle Joyce, for *The Attorney-General*:—

If the *Salvation Army* were out of the question, and the gift had been to *A. B.* for the spread of the gospel, the Court would not have allowed the money to be paid to *A. B.* The testator has said nothing about the *Salvation Army*, and he has not given the legacies for the general purposes of that body. And the deed of the 7th of August, 1878, shews that *General Booth* can alter the purposes of the society whenever he pleases. The purposes of the legacies are so vague that if not charitable they would be void on that ground, therefore there must be a scheme apart from the question of vagueness; to give them over to *General Booth* would be to make them obnoxious to the *Mortmain Act*, for *General Booth* might buy land with the money, and then give the land to the society.

[NORTH, J.:—Has it ever been the practice, when a legacy is directed to be paid to the treasurer of a society, such as the *Society for the Propagation of the Gospel*, to inquire what are the objects of the society, assuming, of course, that the acquisition of land is not its sole or principal object? The judgment in the present case does not direct any such inquiry as to other societies to which legacies are given by the testator, with a direction to pay them to the treasurers of these societies, though an inquiry is directed who are the respective treasurers of the societies.]

The objects of many long established charitable societies are so well known, and have been so often before the Court, that it

may be said to take judicial notice of them, and many of the purposes of the *Salvation Army* as set forth in their code of rules, cannot be said to be "the spread of the gospel." So much is left by the rules in the absolute power of *General Booth*, that the Court would not be justified in allowing a legacy "for the spread of the gospel" to be paid to him.

[NORTH, J.:—The spread of the gospel may be accomplished in many ways. For instance, the *Society for the Propagation of the Gospel* might, for the purpose of spreading the gospel, keep a yacht to carry their missionaries about, as in the well-known case of the *Free Church Yacht*, and might pay the wages of the seamen out of their funds. If I should direct a scheme to be settled, should I not be giving the selection of the mode of spreading the gospel to the Attorney-General instead of to the person intended by the testator?]

When the Court directs a scheme to be settled, the course is for the person named by the testator as legatee to bring in a scheme. The Attorney-General must then shew some reasonable objection to it, and the Court has to decide. It would be contrary to the practice of the Court to allow a legacy of this kind to be paid to an individual, when there is no security as to its application in accordance with the defined purposes of any corporation or organized body. *Waldo* v. *Caley* (1) was a very different case from the present. There the testator had in distinct terms directed that his widow was to have a discretion as to the application of the money, and even there liberty to apply to the Court was reserved. In *Walsh* v. *Gladstone* (2) the circumstances were similar. In this case *Wellbeloved* v. *Jones* (3); and *Corporation of the Sons of the Clergy* v. *Mose* (4) should be followed.

Renshaw, in reply.

Everitt, Q.C., and *Vaughan Hawkins*, for the Plaintiff in the action.

Blackmore, for the Defendant in the action.[1]

(1) 16 Ves. 206.
(2) 1 Ph. 290.
(3) 1 S. & S. 40.
(4) 9 Sim. 610.

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In re LEA.

LEA *v.* COOKE.

Cozens-Hardy, Q.C., and *Geare*, for residuary legatees.

Theobald, for next of kin.

1887. Feb. 7. NORTH, J.:—

It is not disputed that the bequests for the spread of the gospel are good charitable bequests; but not being given exclusively out of the testator's pure personalty they can only take effect for such a proportion thereof as such pure personalty bears to the testator's whole estate. The point upon which I reserved judgment was whether the sums which were available in respect of the £4000 legacy and the moiety of surplus income bequeathed for that object, ought to be made the subject of a scheme; or to be paid to the legatee named without any scheme, the mode of application being left to him. No question arises now as to the £8000 legacy, as the niece to whom the income was given for life is still living. The legatee described by the testator as *General William Booth* is the gentleman well-known as the present head of the organized body called the *Salvation Army*. There is full evidence before me of the nature and objects of that body, including the deed-poll enrolled in Chancery, declaring their doctrines and constitution. It appears from the recitals that the earliest efforts of the *Salvation Army*, formerly known as the "*Christian Mission*," were addressed to bringing under the gospel those who were not in the habit of attending any place of worship, and I think that their great object may now fairly be described as being the diffusion of religion and the spread of the gospel. By their deed of constitution, dated in 1878, their founder Mr. *Booth* was made for his life general superintendent of that body, and he has consequently become well-known as *General Booth*, and it became his duty under that deed "to determine and enforce the discipline and laws and superintend the operations of the society, and to conserve the same to and for the objects and purposes for which it was first originated," and he was empowered to expend on behalf of the body all money contributed for the general purposes thereof, or any of its special objects or operations, and required to publish annual balance sheets, duly audited, of all receipts and payments. These duties he still continues to perform, and under his superintendence the

body has made very rapid progress, and its operations are daily extending. The accounts are regularly published, and I have carefully examined those issued in 1886, and it appears from them that very numerous sums of large aggregate amount come to the hands of *General Booth*, and are applied in a very large number of payments, generally of small amounts. The testator was at any rate to some extent aware of the operations of the body in question, and has on several occasions contributed to its funds. He describes the legatee on each occasion by reference to his official character. In the case of every other legacy in favour of a charity he provides for payment to the intended recipients. I have no doubt that if he had been asked whether he wished that these bequests should be intrusted to the General for him to apply them he would have answered in the affirmative. Under these circumstances I do not think it necessary to direct any scheme as to the application of the legacies in question. It would be out of the question to attempt to do so as to the surplus income in each year, and in my opinion the testator did not intend, and it is unnecessary to make, any distinctions between the income and the capital legacy. The cases of *Powerscourt* v. *Powerscourt* (1), *Waldo* v. *Caley* (2), *Horde* v. *Earl of Suffolk* (3), and *Walsh* v. *Gladstone* (4) supply ample authority for that view. I do not think that the establishment of any permanent trust is what the testator contemplated. I think the control of the Court quite sufficiently maintained by giving leave to apply, as was done in those cases, and here application will no doubt be necessary when the interest of the tenant for life of the £8000 legacy comes to an end.

Solicitors: *Vizards & Crowder*, agents for *Humfrys, Hereford*; *Ranger & Burton*; *The Solicitor to the Treasury.*

(1) 1 Moll. 616.
(2) 16 Ves. 206.
(3) 2 My. & K. 59.
(4) 1 Ph. 290.

D. P.

STIRLING, J.

1886

July 28, 29, 31; *Aug.* 2, 3; *Nov.* 8, 13.

BADELEY *v.* CONSOLIDATED BANK.

[1884. B. 1819.]

Equitable Charge—Notice—Order—Garnishee—Priority—Execution Creditor—Partner—Bovill's Act (28 & 29 *Vict. c.* 86) [*Revised Ed. Statutes, vol. xiv., p.* 1142]—*Share of Profits—Creditor—Action to enforce Security—Rights of Surety.*

An equitable charge given before a garnishee order is obtained takes priority of the order even in the absence of notice of the charge.

An execution creditor is not in the position of a purchaser or mortgagee who has advanced money on the faith of the property, and he can only take the beneficial interest of the creditor.

An action to enforce a security given by a trader is not an action to recover principal, profits, or interest within *Bovill's Act*, 28 & 29 Vict. c. 86; and may therefore be maintained by a person entitled to receive a share of the profits of a trader, although the other creditors of the trader have not been satisfied.

By deed it was agreed that a lender should advance money to a railway contractor: the contractor by way of security assigned the benefit of his contract and the materials employed by him, and covenanted to repay all advances within six months: and the lender was to receive interest and one tenth of the net profits made by the contractor:—

Held, on the construction of the whole deed and of the correspondence between the parties that this deed was a device, and that the lender was a partner with the contractor, and must indemnify a person who had a claim against the contractor arising out of a guarantee given in connection with the contract.

The rights of a surety against his principal are not exactly the same as those of the creditor; and therefore, although a creditor who has recovered judgment against one partner cannot sue another partner, that rule does not take away the rights of a surety for one partner as against another partner.

Kendall v. *Hamilton* (1) distinguished.

IN the year 1878, *J. M. Smith*, who had contracted with the *Bury and Tottington District Railway Company* for the construction of their railway, borrowed money from *John Badeley*, and by way of security for the repayment he executed several indentures of mortgage, the principal indenture being dated on the 4th of July, 1878. By that indenture, after reciting the contract with the railway company and that *Smith* was entitled to certain policies of insurance

(1) 4 App. Cas. 504.

and was about to commence the construction of the railway and the works thereof, and that for the purpose of the said works and for the performance of the said contract *Badeley* had agreed to advance to *Smith* the sum of £1500 upon having such advance and any further advances made by him to *Smith* for the same purposes secured in manner thereinafter appearing, and that it had been agreed that *Badeley* should receive in respect of such advances interest at the rate of 20 per cent. per annum payable as thereinafter mentioned, and as a further consideration for such advances it had been agreed that he should also receive one tenth part of the net profits arising from the performance of the contract, such net profits to be ascertained in manner thereinafter appearing, It was witnessed, first, that *Smith* covenanted for payment of the £1500 at the expiration of six months from the date of the deed, and also that he would within six calendar months from the time or times of the same respectively being advanced or becoming due, pay to *Badeley* such other moneys, if any, as might be advanced to or on account of or might become due by *Smith*, with interest thereon at the rate aforesaid from the time or times of the same respectively being advanced or becoming due. There was then an assignment, first of the full benefit of the contract, then of all principal moneys and interest, shares, bonds, and debentures whatsoever, and all dividends and interest upon any such shares, bonds, and debentures, which *Smith* might at any time receive or become entitled to receive from the company under the contract or agreement, and of all the materials, stock, horses, wagons, trucks, engines, machinery, tools, implements, scaffolding, huts, sheds, erections, plant and effects whatsoever, belonging to or to belong to *Smith*, his executors or administrators, which then were or thereafter at any time might be in, upon, or about the railway, or the works, buildings, approaches, or appurtenances thereof, or purchased or otherwise acquired for the purposes thereof, and also the policies of insurance which had been mentioned in the recital. Then followed a power for redemption in the terms of the covenant. Then followed some covenants by *Smith* that he would duly and with all proper dispatch and at his own instance make, carry on, and complete the railway and works, and duly apply and employ all moneys which

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had been or might be advanced by *Badeley* for the purposes of the works or other the purposes for which the same were advanced, and would pay and discharge all expenses and duly observe and perform all the agreements on the part of him, the said *Smith*, and the provisions in the said contract contained. The deed contained a power in case at any time default should be made by *Smith* in the performance of any of the covenants or agreements on his part, or in case of his becoming bankrupt, for *Badeley* to enter and take possession and seize all or any part of the works and the plant assigned, and to carry on and complete the works. The deed also contained a power of sale, and a proviso that any shares, bonds, or debentures, should not be disposable until the expiration of twelve calendar months from the completion of the contract, and that *Badeley* should hold the same subject to the agreements existing between the company and *Smith* in relation thereto, and with the benefit of such agreements. Also a covenant by *Smith* with the plaintiff to pay to the plaintiff one equal tenth part of the net profits made by *Smith* by the performance of or under the contract, such net profits to be ascertained by him one calendar month from the date of the final certificate under the contract, and such equal tenth part to be paid within seven days from the day when such net profits should have been so ascertained as aforesaid, from which day such equal tenth part should be deemed an advance secured by indenture, save that no interest should be payable in respect thereof: provided always, that in ascertaining such net profits the annual sum of £1000 which might be drawn out by *Smith* should be treated as an allowance made to him for his services in relation to the carrying out the contract, and should be deemed an outgoing and be deducted from the profits under the said contract before ascertaining the said net profits.

Badeley accordingly made large advances to *Smith*, and the railway company were in want of money to pay *Smith*. An arrangement was then made in pursuance of which the chairman and four of the directors of the company gave a guarantee to the *Consolidated Bank* to cover advances to *Smith* not exceeding £16,000. Under this guarantee £12,600 was advanced to *Smith* by the bank. A further contract was made on the 27th of

November, 1880, between the railway company and *Smith*, which provided, amongst other things, that *Smith* would accept for cash payments *Lloyd's* bonds for the same amounts; which *Lloyd's* bonds as the same should become deliverable should be handed over to the *Consolidated Bank* until a total of £16,000 should have been handed over to the bank; and the bonds should remain in the hands of the bank until the sum of £16,000 which had been guaranteed to the bank or other the amount due on the guarantee had been repaid to the bank.

The railway company accordingly in 1881 issued bonds for £16,000, which were deposited with the bank.

In February, 1882, one *Wallis* recovered judgment against *Smith* for money due, and obtained orders attaching all debts due by the railway company to *Smith*, and also the *Lloyd's* bonds in the hands of the railway company. Formal notice of *Badeley's* charge was not given to the railway company until April, 1882. Other creditors of *Smith* in 1883 obtained attaching orders.

The railway company were unable to pay *Smith*, who in December, 1882, brought an action against the company. The company on the 17th of February, 1883, filed a scheme of arrangement, which was opposed by *Smith* and *Badeley*. The action by *Smith* against the railway company was compromised by an order of the 13th of July, 1883, on the terms that the balance due from the company to *Smith* should be agreed to as £38,000; that the opposition to the scheme should be withdrawn, and that the £38,000 should be discharged by the issue as against the delivery of the *Lloyd's* bonds of debenture stock to the same nominal amount. The scheme had been sanctioned by an order of the 8th of July, 1883, which provided that the company should issue debenture stock not exceeding £60,000, which should be applied, first, in payment to the contractor of the sums found due to him; secondly, in payment of the advances made to the bank; thirdly, in payment of what was due to the holders of certain *Lloyd's* bonds; and fourthly, in payment of the other liabilities of the company.

G. H. Terrell, to whom *Smith* was indebted as his solicitor in the action, applied for a charging order for his costs, and an order was made on the 1st of April, 1884, in the action by *Smith* against

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the railway company and in the presence of *Badeley*, in the form given in 1 *Seton* on Decrees, 641, declaring that *G. H. Terrell*, as the solicitor employed by the Plaintiff in the prosecution of the action, was entitled to a charge on the £38,000 debenture stock, and that no part of the debenture stock should be handed over to the Plaintiff without notice to the applicant. *G. H. Terrell* sub-mortgaged this charge to *A. àBecket Terrell*.

The *Consolidated Bank* had sued *Smith*, and had recovered judgment against him for the amount of their advances. The guarantors had paid to the bank all that was due, but the bank still held the *Lloyd's* bonds. *Smith* had become bankrupt.

The railway company were about to issue the debenture stock, and *Badeley* brought this action against the *Consolidated Bank*, the railway company, the surviving guarantors, and the executors of *Haworth* (one of them who was dead), the judgment creditors, the trustee in bankruptcy of *Smith*, and others, claiming a declaration that the Plaintiff and the guarantors would be entitled upon delivery to the railway company of the *Lloyd's* bonds to a first charge upon the £38,000 debenture stock for the amounts owing to them respectively, as regards the Plaintiff upon the security of the indenture of mortgage and the *Lloyd's* bonds above mentioned, and as regards the guarantors upon the security of the deposit of the *Lloyd's* bonds: that the railway company might be ordered to issue the £38,000 debenture stock to the Plaintiff and the guarantors: in the alternative that the Plaintiff might be declared to be entitled as first mortgagee to the whole of the debenture stock; if the Court should determine that the guarantors had no interest therein: accounts and foreclosure in default of payment by the Defendants respectively (other than the railway company and the guarantors), or any of them, of the amounts found due.

The executors of *Haworth* besides other defences pleaded that the Plaintiff was in fact a partner with *Smith*, and as such must indemnify *Haworth's* estate against all claims under the guarantee and they counter-claimed accordingly.

The correspondence between the solicitors and that between *Badeley* and *Smith* was largely referred to as proving that they were in fact partners. From the correspondence it appeared that *Smith* was introduced by the solicitor of both to *Badeley* in

1876 as a railway contractor who wanted to find a capitalist who would advance on terms including "say 10 per cent. interest and 10 per cent. on the profits." In a subsequent letter to *Badeley*, the solicitor said: "If this first transaction went through all right, some permanent arrangement might be made for a sleeping limited partnership." *Badeley* then advanced money to *Smith* on a contract with the *Great Western Railway Company*, which money was still due when *Smith* made the contract with the *Bury and Tottington Railway Company*. A draft of a proposed deed between *Smith* and *Badeley* was submitted to *Smith*, who thereupon wrote to the solicitors: "It occurs to me that there were three omissions in the document I read over with Mr. *Lloyd* yesterday: 1st, capital not to be withdrawn till completion of contract, and payment of final certificate, if works are proceeded with diligently, and interest paid promptly; 2nd, in addition to 10 per cent. on working capital advanced to me, a proportion equal to 10 per cent. of the net profits to be paid by me also; 3rd, an amount equal to £—— per annum to be drawn by me for services rendered on behalf of contract, and such sum to be charged to contract before declaring profits." The words "working capital" and "drawn out" were relied on as shewing the real meaning of the parties, and throughout *Smith* referred to *Badeley's* advances as "capital" and "working capital." *Badeley* also, in his letters, spoke of "my capital with which he (*Smith*) had started in life," and *Badeley* had stated that he did not expect his principal until the conclusion of the contract. In a letter of 6th of January, 1881, *Badeley* spoke of bad times, and said that *Smith's* success was the only success he could look forward to. He was anxious not to make severe terms with one who had not given the least reason to shew anything short of confidence in his undertakings. On the 10th of January *Badeley* wrote, "I suppose it may be right as a matter of form to put a date upon the repayment of the advance made upon the last contract with *J. M. Smith*, in the event of death, &c.. on either side, but I should not wish it to be dated so as to interfere with his liberty in the completion of the contract." "I could not of course expect more of him than was due for capital and interest. Will you explain to him on giving a limit to his covenant that it is merely a

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covenant without powers at all until dated, and that I of course only ask for the means of recovering any actual loss." The following passages in letters were also relied on as shewing that the contract was really carried on for the benefit of *Badeley* and *Smith* jointly. On the 20th of August, 1878, *Smith* in asking for an advance says: "It will be a pity to minimise the amount of profit by being limited to an impracticable amount of capital." "If I had double the amount I could use it most profitably and advantageously." "I am working this energetically, and have a full and profitable use for a very much larger capital than I at present have at command. I wish very much to put the matter as clearly as I can before you, for I have profitable work in hand, and I want to turn it to the best account, both in your interest and in my own." To this *Badeley* answered, promising to send another £1000 "as I see by your letter it is to our mutual advantage to expedite matters." In a letter of the 1st of February, 1879, *Badeley*, in answer to applications for money, said: "rather than we should pay a high interest to find the capital at once, I have arranged to place £500 to your credit." "I hope we shall pull it all well out of the fire by your economy and by our obviation of borrowing ready money at exorbitant prices."

Reid, Q.C., *Swinfen Eady*, and *Eve*, for the Plaintiff:—

The Plaintiff as *Smith's* mortgagee is entitled to everything he would have received from the railway company, subject to the contract under which the bonds were delivered to the bank. [Their arguments are referred to in the judgment.]

As to the counter-claim of *Haworth*. If the Court should hold that *Badeley* was a partner with *Smith*, nevertheless the guarantor's claim against *Badeley* is gone. For the bank having sued and recovered judgment against *Smith*, one partner cannot proceed against *Badeley*, the other partner, as was decided by *Kendall* v. *Hamilton* (1), and the guarantors can have no higher rights against *Badeley* than the creditor had. If the bank by suing *Smith* has discharged *Badeley* it may be that it has also discharged the guarantors; but as *Badeley* is no longer liable to the

(1) 4 App. Cas. 504.

bank he cannot be liable to his sureties, and they have no claim against him.

The secretary of the company and other witnesses were examined, and much correspondence and documentary evidence was put in.

Cozens-Hardy, Q.C., and *Renshaw*, for the executors of *Haworth*, one of the guarantors:—

On general principles and on the authorities, the Plaintiff, as regards third parties, was a partner with *Smith*, having found the whole of the capital. The evidence supports all the essentials to create a partnership. *Badeley* advanced his money for the sole purpose of enabling *Smith* to carry out the contract, and allowed *Smith* to use the bonds to raise further capital for the contract, although they were part of the security for his loan. The effect of the deed was to create a sleeping partnership between the Plaintiff and *Smith*, and *Smith* was clearly carrying out the contract for the joint benefit of himself and *Badeley*, who was to be repaid by sharing in the profits: *Cox* v. *Hickman* (1): *Pooley* v. *Driver* (2); *Ex parte Delhasse* (3); *Ex parte Taylor* (4). But even if the Plaintiff was not a partner, still he is not entitled to relief in this action. He cannot be paid until all the other creditors have been paid: *Partnership Law Amendment Act*, 1865 (28 & 29 Vict. c. 86), ss. 1, 5. The case of *Ex parte Sheil* (5) is distinguishable. That was not a claim by a creditor, but a motion by a trustee in bankruptcy to deprive a creditor of the benefit of his security. As to the *Lloyd's* bonds: we hold them, and are entitled to sit upon them until we are paid in cash. We are therefore entitled to judgment on our counter-claim, and to have this action dismissed as against us with costs.

Barber, Q.C., and *S. Hall*, for the three living guarantors:—

We were not consenting parties to the compromise or scheme. But even if we were, our rights are not altered by it. We are

(1) 8 H. L. C. 268.
(2) 5 Ch. D. 458.
(3) 7 Ch. D. 511.
(4) 12 Ch. D. 366.
(5) 4 Ch. D. 789.

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the first creditors as to the *Lloyd's* bonds, and this action should be dismissed as against us with costs.

S. Hall, for the *Consolidated Bank*, submitted to act as the Court might direct, and asked for his costs.

Maclean, Q.C., and *W. P. Beale*, for the Railway Company:—

We are mere stakeholders, and are perfectly willing to accept the terms of the compromise of the 13th of July, 1883, or to pay anybody so long as we can get a valid discharge.

Hemming, Q.C., and *Tanner*, for *A. à Becket Terrell*:—

My client as mortgagee of *G. H. Terrell's* charge has priority over the Plaintiff. The action ought, therefore, to be dismissed with costs as against him. The charging order in point of form is a first charge against all the world, and whether right or wrong, stands until repealed.

Sir *C. Russell*, A.G., and *Hodgson*, for *Wallis*, claiming under a garnishee order:—

The Plaintiff is not entitled to priority over *Wallis*. He has not given notice to the debtor. This is an application by a particular creditor to obtain priority over a particular part of the debtor's property as against other creditors. If it succeeds, then *Bovill's Act* (28 & 29 Vict. c. 86), is of very little good.

As to the guarantors. They were not guarantors at all. They were directors and really represented the company as particular debtors. But if they were guarantors, then they were bound by the scheme.

Byrne, and *C. B. McLaren*, for other parties.

Reid, in reply:—

These garnishee orders *nisi* were never made absolute. Notice to the debtor was not necessary: *Arden* v. *Arden* (1); *Pickering* v. *Ilfracombe Railway Company* (2); *Robinson* v. *Nesbitt* (3). As to the main point, the deed by itself contains no clauses except

(1) 29 Ch. D. 702. (2) Law Rep. 3 C. P. 235.
(3) Law Rep. 3 C. P. 264.

such as are reasonably necessary for the protection of a lender, which distinguishes it from *Pooley* v. *Driver* (1), and that class of cases, where everything necessary for the protection of a partner was inserted. The true test is whether the deed creates the relation of debtor and creditor or a partnership. Here there is no contribution of capital as in *Pooley* v. *Driver*, and no provision for refunding profits. If a lender is to be paid a share of profits for his loan, he is entitled to define in the contract of loan how and in what way the net profits are to be ascertained, and is not bound to leave it open for future dispute. He is also entitled to stipulate the way in which the money is to be applied. Here there has been no holding out of the Plaintiff as a partner, and the correspondence from 1876 to 1879, leading up to the deeds, cannot be looked at for the purpose of avoiding the deeds or of proving a partnership. As to the guarantors, they are not entitled to sue the Plaintiff as a partner in this transaction. The money was lent to *Smith* only, credit given to him only on his private account. As to *Haworth's* executors: they are not entitled to anything on their counterclaim, and as it is their contention that has caused this litigation they ought to pay all the costs occasioned by it. As to the judgment creditors and *Smith*, they have obtained garnishee orders, but if their contention that this was a partnership be correct, their garnishee orders are of no avail. They cannot garnish partnership assets for *Smith's* private debts, and *Bovill's Act* does not apply.

Cozens-Hardy, in reply, on his counter-claim.

1886. Nov. 8. STIRLING, J.:—

This is an action by *John Badeley* (who claims to be an incumbrancer on certain debenture stock about to be issued by the *Bury and Tottington District Railway Company*, and on certain *Lloyd's* bonds) to enforce a charge upon that property. The Defendants are the railway company, the *Consolidated Bank*, who are the holders of the *Lloyd's* bonds issued by the railway company, and other persons alleged to claim an interest in the stock and bonds.

(1) 5 Ch. D. 458.

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The transactions which give rise to the action are of a very complicated nature, but so far as they are material may be stated as follows. [His Lordship then stated the facts of the case as above stated; and on the questions raised by the guarantors and the *Consolidated Bank*, he held that there was nothing to bind them to accept debenture stock, and that the Plaintiff must redeem the *Lloyd's* bonds. His Lordship then proceeded:—] I will next consider the position of those creditors of *Smith* who have obtained orders attaching the debts due to him from the railway company. They claim priority over the Plaintiff on various grounds. First, it is contended on behalf of *Wallis* that he is entitled to priority, because at the time when he obtained his order, formal notice of the security of the 4th of July, 1878, had not been given by the Plaintiff to the railway company. Now, it was held by the House of Lords in *Eyre* v. *McDowell* (1) (in accordance with the decisions of Vice-Chancellor *Wigram* and Lord *Lyndhurst* in *Whitworth* v. *Gaugain* (2)), that an execution creditor obtains under 1 & 2 Vict. c. 110, a charge only on the beneficial interest of the debtor at the time when the charge takes effect; and this principle has been applied by Mr. Justice *Chitty* in a recent case of *Ex parte Whitehouse* (3) to garnishee orders. It was in the last-mentioned case decided that an equitable charge given before a garnishee order takes priority of the order even in the absence of notice. I consider, therefore, that I am bound to hold, both on principle and authority that this contention is not well founded.

Secondly, it is said that the Plaintiff has disentitled himself from claiming this priority by his own conduct and laches, inasmuch as he permitted *Smith* to retain the *Lloyd's* bonds in his own possession and to deal with them. If the claim to priority were set up by a purchaser or mortgagee, who had dealt with *Smith* on the faith of his being in possession and owner of the bonds, there might be much to be said in support of such a view, but the persons who seek to deprive the Plaintiff of priority are not purchasers or mortgagees, but simply execution creditors who never dealt in any way with *Smith* on the faith of his being the owner

(1) 9 H. L. C. 619. (2) 3 Hare, 416; 1 Ph. 728.
(3) 32 Ch. D. 512.

or holder of these bonds. Their right, according to the decisions I have just referred to, is to have the beneficial interest of their debtor in these bonds applied in satisfaction of their debts, and I hold that this contention of theirs also fails.

Thirdly, it is said that the Plaintiff is precluded from bringing this action by 28 & 29 Vict. c. 86, commonly known as *Bovill's Act*. That Act, in sect. 1, provides that, "The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such." Then sect. 5: "In the event of any such trader as aforesaid being adjudged a bankrupt . . . . the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied."

The meaning of this section was considered to some extent in the case of *Ex parte Sheil* (1). There a loan was made to a trader at a rate of interest varying with the profits of his business, the amount of the loan and the interest being secured to the lender by a mortgage of the lease of the house where the business was carried on and the goodwill of the business. The trader filed a liquidation petition. The trustee entered into a contract to sell the lease and the goodwill of the business, and then he applied to the Court for an order that upon payment by the purchaser to the trustee of the balance of the purchase-money, *Sheil*, the mortgagee, might be directed to concur with the trustee in assigning the mortgaged property to the purchaser free and discharged from all claims by *Sheil* in respect of his mortgage, and that, if necessary, he might be directed to deliver up the mortgage deed to the trustee or to the purchaser. This

(1) 4 Ch. D. 789.

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application came in the first place before the Registrar in Bankruptcy, who refused the application. Then the trustee appealed, and by his notice of appeal he asked that the Registrar's order might be discharged, and that it might be declared that *Sheil* was not entitled by virtue of his mortgage or otherwise to recover any portion of the principal money, profits, or interest expressed to be secured to him thereby until the claims of the creditors of the bankrupt for valuable consideration, in money or money's worth, had been satisfied, and that proper directions might be given for enabling the sale of the leasehold premises and goodwill to be completed and the purchase-money received by the trustee. The notice also stated that the trustee would not insist on the mortgage deed being delivered up by the mortgagee. This application was refused, and the appeal was dismissed. In giving judgment, Sir *George Jessel*, the late Master of the Rolls, says (1), "There is not a word in the 5th section inflicting any penalty or disability or any confiscation upon him in respect of the mortgage which he has so taken. He is not seeking to recover anything in the shape of money. He only says, 'I have or can obtain the legal possession of the house. I have that for a legal term of years. I do not ask to recover anything from the bankrupt or his estate.' That being so, it does not appear to me that the section applies to him at all. He still retains the possession of the house, subject to redemption, as before the bankruptcy, and if the trustee in the bankruptcy thinks fit to say, 'I will take the house from you,' he is at liberty to do so upon the terms of the mortgage deed." Lord Justice *James* said, "I am of the same opinion. I think the word 'recover' means recover, and does not mean 'retain.'" Now, as to that case it is clear that in point of decision it does not cover the present case, and it is said that the judgments merely shew that the creditor, the mortgagee, is entitled to keep or retain the mortgage property until the debt is paid; but is not entitled to bring an action to enforce the security. The words of the section, "The lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan," are referred to, and it is said that in this

(1) 4 Ch. D. 792.

action the Plaintiff is seeking to recover his principal and interest —the very thing which is forbidden by the statute. In order to decide upon this we must consider what the nature of the action is. The statement of claim asks, first, for a declaration that the Plaintiff and the guarantors will be entitled upon delivery up to the Defendant the railway company, of the *Lloyd's* bonds to a first charge upon £38,000 debenture stock. Then that the Defendant railway company may be ordered to issue the £38,000 debenture stock, or in the alternative that the Plaintiff may be declared to be entitled as first mortgagee to the whole of the stock in the event of the Court determining that the guarantors had no charge, lien, or security thereon, then for an account, and then for foreclosure. And to that must be added that which is proposed to be introduced by amendment, viz., a claim for redemption of the *Lloyd's* bonds as against the guarantors, and for foreclosure as against the other incumbrancers. So that in substance it is an action to recover the £38,000 debenture stock, and for foreclosure of the various interests of the Defendants on that stock, and also on the *Lloyd's* bonds which form part of the security.

The question, then, is whether such an action is an action to recover principal, profits, or interest within the statute. That question is apparently new on the present statute, but analogous questions have had to be considered upon some other statutes. For example, sect. 40 of the well-known *Statute of Limitations*, 3 & 4 Will. 4, c. 27, provides that no action or suit shall be brought to recover any sum of money secured by any mortgage or otherwise payable out of any land but within a certain time; and in *Wrixon* v. *Vize* (1) the question arose whether a foreclosure suit was a suit for the recovery of money within the meaning of that section. Lord *St. Leonards*, contrary to the decision of *Shadwell*, V.C., in *Dearman* v. *Wyche* (2) held that it was not. Lord *St. Leonards* says (3): "In *Dearman* v. *Wyche*, with which, when I had occasion to refer to it incidentally, I was inclined to concur, the Vice-Chancellor held, that a bill of foreclosure fell within the 40th section, for it is in substance a suit in equity for recovery of the money. It is, the Court

(1) 3 D. & War. 104. (2) 9 Sim. 570. (3) 3 D. & War. 120.

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said, a suit to recover money. But—with great respect I say it—I cannot, upon consideration, take this view of the statute. I think that the statute provides a remedy for the recovery of the estate, and also a remedy for the recovery of the money; clearly so, when both are pursued, or one is pursued at law; and equally so, I think, when both the remedies are enforced, or only one of them is enforced in equity. A foreclosure suit may lead to the payment of the money. But this is optional with the defendant. It cannot be enforced against him. The plaintiff's right is simply to foreclose; but he can only accomplish that upon a previous condition. The right of the defendant to pay the money, whilst the only right of the plaintiff is to the estate discharged of the equity, can hardly bring the case within the 40th section, which applies strictly to an action or suit to recover the money secured by any mortgage. This right at law cannot be confounded with the right to recover the estate. Why should it in equity? It cannot, I think, be said, that the suit is not to recover the land, as it is already vested in him, for this expression would be strictly accurate, where the mortgage is of the equitable estate; and where the mortgage is a legal one, yet the suit is, in effect, to recover or obtain the equity of redemption, which is, in the view of equity, an actual estate." That opinion—although in some cases in the Court of Chancery in *England* it was not adopted—has ultimately been approved and acted upon in the recent cases of *Heath* v. *Pugh* (1) and *Harlock* v. *Ashberry* (2). Again, the *Solicitors' Act* of 1843 provides, in sect. 37, that: "No solicitor shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such solicitor until the expiration of one month after such solicitor shall have delivered his bill of costs." Notwithstanding this, it was held by Lord *Westbury* in *Thomas* v. *Cross* (3) that a solicitor who had taken a mortgage from his client to secure the payment of his costs, was entitled to file a bill for foreclosure, although he had not delivered his bill. What his Lordship said is this: "This bill was not, in the language of the Act, 'an action or suit for fees, charges,

(1) 6 Q. B. D. 345; 7 App. Cas. 235.
(2) 19 Ch. D. 539.
(3) 13 W. R. 166, 167; 10 Jur. (N.S.) 1163.

or disbursements for business done by an attorney or solicitor.' It was true that a decree of foreclosure might in effect compel payment, but it was not in form a decree for payment." That is the essential portion of the judgment.

Of course, these are decisions upon other statutes, and they are not strictly in point, but the *ratio decidendi* in all these cases appears to be that an action for foreclosure is not an action for recovery of what is secured by the mortgage, but of the property conveyed or assigned by way of security, and this action appears to me to be of that nature, viz, not an action for recovery of principal, interest, and share of profits, but an action for the recovery of the property which is conveyed or assigned by way of security.

I am, therefore, of opinion that *Bovill's Act* does not preclude the Plaintiff from maintaining the action, and I am fortified in this by observing that the late Master of the Rolls, in the passage which I read from his judgment in *Ex parte Sheil* (1), says that there is no penalty or disability or confiscation inflicted upon a mortgagee in respect of the mortgage which he has taken. Now, if there is no penalty or disability or confiscation inflicted upon a mortgagee in respect of his mortgage, why should he not bring an action to recover that which is comprised in it? Further the Master of the Rolls refers to the possibility of the mortgagee obtaining the legal possession of the house, which in that case formed the subject of the mortgage, and that seems to me to indicate that in his opinion it was competent for the mortgagee to bring an action to recover possession of the house. And, in the course of the argument, Lord Justice *James* puts the very question: "What is there to prevent the mortgagee from foreclosing his mortgage?" It seems to me that those learned Judges certainly did not decide that it was not competent for the mortgagee to bring an action for foreclosure, and these *dicta*, as far as they go, appear to be in favour of the opinion which I have expressed.

I hold, therefore, that the contention of the holders of the several garnishee orders fails, and that they have not established any right of priority over the Plaintiff.

(1) 4 Ch. D. 789.

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[His Lordship, as to the claim made by *Terrell*, held that the Plaintiff was bound by the order made in his presence, and that *Terrell* had priority over him in respect of that.]

Lastly, I come to a question which is raised only by the legal personal representatives of *Barnes Haworth*, deceased, who was one of the guarantors. They plead that the Plaintiff was, as regards third persons, a partner with *Smith* in his transactions with the railway company, and by counter-claim they seek judgment against the Plaintiff on this footing. The question is whether the Plaintiff is a creditor of or a partner with *Smith*, and in the first place it is to be noted that by the deed of the 4th of July, 1878, the Plaintiff became entitled to a share of the profits of the contract between *Smith* and the railway company. The law applicable to this question appears to be concisely stated in one or two passages in the well known case of *Mollow, March, & Co.* v. *Court of Wards* (1). Sir *Montague Smith*, in giving judgment in that case, says (2):—"It appears to be now established that although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where from such perception alone it may as a presumption not of law but of fact be inferred; yet that whether that relation does or does not exist must depend on the real intention and contract of the parties. It is certainly difficult to understand the principle on which a man who is neither a real nor ostensible partner can be held liable to a creditor of the firm. The reason given in *Grace* v. *Smith* (3), that by taking part of the profits he takes part of the fund which is the proper security of the creditors, is now admitted to be unsound and insufficient to support it; for of course the same consequences might follow in a far greater degree from the mortgage of the common property of the firm, which certainly would not of itself make the mortgagee a partner. Where a man holds himself out as a partner, or allows others to do it, the case is wholly different. He is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel.

(1) Law Rep. 4 P. C. 419. (2) Law Rep. 4 P. C. 435.
(3) 2 W. Bl. 998.

Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract." Then, after going into the particular circumstances of that case, and deciding that in that case the partnership relation was not made out, there occurs this passage (1): "Their Lordships' opinion in this case is founded on their belief that the contract is really and in substance what it professes to be, viz., one of loan and security between debtors and their creditor. If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements and fasten responsibility on the parties according to their true and real character." Illustrations of the doctrine laid down in the last paragraph are to be found in the cases of *Pooley* v. *Driver* (2) and *Ex parte Delhasse* (3) which were much relied on by the counsel for *Haworth's* executors.

It is first necessary to consider somewhat in detail the provisions of the deed of the 4th of July, 1878. [His Lordship then read the principal provisions of that deed, and then proceeded:—] Upon that deed it was contended on behalf of *Haworth's* executors in the first place, that the provision that the Plaintiff was to share in the profits of the contract creates a *primâ facie* presumption that partnership is intended and that it then lies upon the person contending the contrary—upon the Plaintiff in this case—to rebut that by other circumstances; and it is said that even on the face of the deed so far is this from being the case that there are provisions apparently confirming the inference that a partnership was intended. Amongst other points they rely particularly upon the covenant taken by the Plaintiff from *Smith* to perform the contract; upon the covenant to apply all the advances for the purposes of the contract; and, lastly, upon the stipulations that in ascertaining the profits an

(1) Law Rep. 4 P. C. 438. (2) 5 Ch. D. 458.
(3) 7 Ch. D. 511.

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annual sum of £1000 should be treated as an allowance to be made to him for his services, and more especially on the stipulation that that sum may be drawn out by *Smith* by equal quarterly instalments; and with reference to that it is said that the words "drawn out" point to the application for this purpose of some fund which would not but for this provision be applicable for the purpose. On the other hand, it is said that on the face of it, the deed created the relationship of debtor and creditor, and it contains a covenant under which *Smith* incurred a personal liability for the repayment of the advances at fixed dates with a corresponding proviso for redemption which would enable him at any time if he was so disposed to pay off all the advances which were made to him. It was contended, however, that the covenant for repayment was not meant to be enforced, and that it was never intended that the Plaintiff's money should be called in until the completion of the contract, and this contention was supported by evidence of various matters to which I am now about to call attention, and particularly by reference to a correspondence of which certain letters were quoted and commented on during the argument. I originally intended to confine my attention to the letters so quoted, but when I came to look at them I found some expressions in them which did not appear quite intelligible without reference to the others, and in consequence of that I have, with the consent of counsel on both sides, read through the whole correspondence which in fact was formally put in. I am very glad that I have done so, because a perusal of the correspondence as a whole has altered my views, on at least one point as to which the letters quoted led me into what might have been a serious misapprehension. [His Lordship then read parts of the correspondence, most of which are set out in the statement.]

Of course I cannot go through the whole correspondence, which is very long, and I have only selected such letters as have appeared to me more strikingly to indicate the real intention of the parties. Upon the whole, I think it is clear that it was not intended that the Plaintiff's advances should be called in until the contract was brought to an end, and I cannot believe that even then the Plaintiff, regard being had to the financial position of *Smith*, placed any great reliance on the personal

liability under the covenant. I think he considered his real security to be in the plant assigned to him by the deed, and that his expectation and meaning were that the money advanced to *Smith* would, as the result of the stipulations contained in the deed, be to a large extent applied in the purchase of plant over which he would by means of the powers contained in the deed have complete control, and that such plant upon the determination of the contract would be available for the purposes of a fresh adventure if a suitable one could be found or else would be sold, and in that case the proceeds would be divided just as if a partnership had subsisted between him and *Smith*. Looking at all the circumstances of the case I do not find anything to rebut the presumption which arises from the sharing of the profits, and on the contrary, on the whole, I come to the conclusion that the Plaintiff in reality carried on the business through and in partnership with *Smith*, and that the form which the deed took was simply a device to escape the liability of the partnership while securing for the Plaintiff its benefit.

Under these circumstances, it follows that there must be judgment for *Haworth's* executors on the counter-claim, and of course with costs.

So far as I know, the only other points which should be mentioned are the costs of some of the parties. The Plaintiff of course must pay the costs of the *Consolidated Bank*, and add them to his own. He also must pay either altogether, or, at any rate, in the first instance, those of the railway company. And as to the various incumbrancers, they will be dealt with in the usual way, their costs being added to their securities.

1886. Nov. 13. The action now came on upon the minutes.

STIRLING, J.:—

I take this opportunity of supplying an omission in the judgment which I delivered in this case. A point was raised by Mr. *Swinfen Eady* on which I had made up my mind, but which, in delivering my judgment, I overlooked.

The point was this: On the face of the guarantee certainly the obligation of the guarantors is that of sureties for *Smith*, and

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I see nothing in the facts to make me come to any other conclusion, but that they were in reality guarantors of his debt. The bank to whom the guarantee was given, recovered judgment against *Smith* before the commencement of these proceedings. I have held that the Plaintiff in reality was partner with *Smith*, and no doubt, if the bank had tried to sue the Plaintiff the case of *Kendall* v. *Hamilton* (1) would have afforded a complete answer and defence to the claim. And if the right of the guarantors was simply to stand in the place of the bank, of course the conclusion would be the same. Therefore the question comes to be, is that their sole right? I think not. That right no doubt exists, but it is simply a part of the general right of indemnity which exists on the part of the principal debtor towards his sureties. But I think it clear from various considerations that they have further rights. First of all, they have a right to indemnity and I take it that if a surety could prove that by reason of the non-payment of the debt he had suffered damage beyond the principal and interest which he had been compelled to pay, he would be entitled to recover that damage from the principal debtor. This shews, therefore, that more can be recovered by the surety under the contract of indemnity than could be recovered by the creditor.

Then, again, a strong illustration of the distinction between suing under the contract of indemnity and suing under the right of the creditor is given by the well-known case of *Copis* v. *Middleton* (2), where it was held that the surety was only a simple contract creditor. So in other cases it was held that where the original contract was a bond—a specialty debt—yet the right of the surety to an indemnity was in the nature of a simple contract debt, and consequently that the surety was barred in a shorter time than the creditor would have been. That shews to my mind conclusively that the two rights are distinct. And though, as we all know, that state of the law has been put an end to by the provisions of the *Mercantile Law Amendment Act*, nevertheless these cases are authorities on the question whether the rights of the surety are confined to standing in the place of the creditor. I think not; and, therefore, it appears to me that upon this part of the case *Kendall* v. *Hamilton* is not in point.

(1) 4 App. Cas. 504. (2) T. & R. 224.

1886

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But, then it was said that by suing the debtor the rights had been altered. I do not see that. It is a strange defence, in any case, to come from the person who is really, as I hold, in the position of principal debtor. It is a defence which comes more generally from the surety. It might be appropriate on his part, and the only way in which, as far as I see, it could be available to the Plaintiff, would be by saying that the payment made by the sureties was voluntary, as they had no business to make that payment after the debtor had been sued. I do not think so, and I do not think that their rights are prejudiced because they still have a prior right of indemnity. Therefore *Smith* having become bankrupt I thought, and still think, that the argument upon that point was not well founded.

Solicitors for Plaintiff: *Nash, Field, & Withers.*

Solicitors for Defendants: *Shaw & Tremellen*, agents for *P. & J. Watson, Bury; Phelps, Sidgwick, & Biddle*, agents for *Sale & Co., Manchester; Gregory, Rowcliffes & Co.*, agents for *Addleshaw & Warburton, Manchester; W. P. V. Wallis; Le Brasseur & Oakley; Trinders & Romer; Batten, Proffitt, & Scott*, agents for *W. Harper, Bury; Terrell & Co.*

C. M.

STIRLING, J.
1886
Nov. 17.

In re WILLIAMS.
DAVIES *v.* WILLIAMS.

[1886 W. 653.]

Statute of Limitations, 1833 (3 & 4 *Will.* 4, *c.* 27), s. 6 [*Revised Ed. Statutes, vol. vii., p.* 389]—*Intestacy—Administrator—Claim of Estate—Leaseholds —Running of Time.*

Under the *Statute of Limitations*, 1833 (3 & 4 Will. 4, c. 27), s. 6, time begins to run as against an administrator claiming a chattel interest in land from the date of the death of the intestate, and not from the date of the grant of administration.

WILLIAM WATERS died intestate on the 11th of February, 1849, possessed (subject to a mortgage debt of £210 and interest) of five leasehold cottages at *Abercarne*, in *Wales*, and leaving him surviving a widow and three children by a former wife. The testator's widow, *Mary Waters*, took possession of all the cottages and retained possession of them until her death on the 8th of October, 1859. During her lifetime she paid the interest on the mortgage debt, and also, out of her own moneys, paid off part of the principal sum. She died intestate, leaving her surviving five children by one *Williams*, her first husband. *William Williams*, one of such five children, on the 1st of December, 1859, took out administration to his mother's effects; and he entered upon all the cottages, applied the rents to his own use, paid off the rest of the mortgage debt, and held possession of the cottages as his own until his death on the 13th of March, 1885. By his will, dated the 9th of March, 1885, and proved on the 16th of May, 1885, he appointed the Defendants his executors, and directed that the five cottages then in his possession should be sold and the proceeds (after payment of £100 to a beneficiary) should be divided among certain persons, of whom the Plaintiffs, his sisters, *Charlotte Davies* and *Ann Nicholas*, were two.

On the 6th of May, 1886, letters of administration to the estate of *Mary Waters*, left unadministered by *William Williams*, were granted to the Plaintiff *Charlotte Davies*; and on the 20th of May

letters of administration to the estate of *William Waters* were also granted to the same Plaintiff; and until then no one had ever taken out administration to *William Waters'* estate.

The Defendants proposed to deal with the cottages upon the footing that their testator had at the time of his death become absolutely entitled to them under the *Statute of Limitations*, and that the interest of all persons claiming under *William Waters* or *Mary Waters* had become barred by lapse of time.

The question then arose whether under the *Statute of Limitations* time had begun to run against *W. Waters'* representatives from the date of his death on the 11th of February, 1849, or from that of the grant of administration in 1886, and this action was brought for the purpose of having the rights of all persons interested in the said cottages ascertained and declared by the Court.

Method, for the Plaintiffs:—

The 6th section of 3 & 4 Will. 4, c. 27, enacts that "for the purposes of this Act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration." There does not appear to be any decision upon the construction to be put upon the expression "no interval of time," in such a case, but I submit that its effect must be to bring the two events, the death and the grant, together, and that time only runs from the grant.

A. J. Allen, for the Defendants, submitted that, according to the true construction of the section, time ran not from the date of the grant of letters of administration but from that of the death of the intestate.

STIRLING, J.:—

The construction of this section was adjudicated upon by Mr. Justice *Chitty* in a case in Chambers, in which I was

STIRLING, J. 1886 *In re* WILLIAMS. DAVIES *v.* WILLIAMS.

counsel (1), where he held that this section applied for all purposes of the Act, that the parties in that case were in the same position as if the letters of administration had been granted immediately after the death of the intestate, and accordingly that time under the statute began to run as from the date of the death, and not from that of the grant. That is also my view. The point is discussed in *Darby* and *Bosanquet* on the *Statutes of Limitation* (2), and, although I have not had the advantage of having it argued before me, I think I may decide the question now. I accordingly declare that the persons entitled to the property are the persons interested under the will of *William Williams*, and I dismiss the action without costs. The trustees can take their costs out of the estate.

Solicitors: *Crossman, Crossman, & Prichard*, agents for *R. F. Chilton, Stockton-on-Tees; Thomas White & Sons*, agents for *Gustard & Llewellin, Newport, Monmouthshire.*

(1) NOTE. REP.

CHITTY, J., in Chambers. July 3, 1884.

In re BONSOR & SMITH'S CONTRACT.

A TESTATOR bequeathed a legacy charged on land to a person who survived him, but died an infant before 1860. No administration had ever been taken out to the infant legatee, and upon a sale of the land in 1883, the purchaser objected that the charge was a continuing charge, and that sect. 6 of the *Statute of Limitations* did not apply to charges on land under sect. 40 of the Act.

Stirling for the purchaser.

Jason Smith, for the vendor, contended that the charge was barred by the statute.

CHITTY, J., held that sect. 6 of the statute applied for all purposes, and consequently to cases arising under sect. 40 as well as to cases arising under the earlier part of the Act; that if administration were ever taken out, time would run as from the death of the infant, so that the principles regulating the rights of the parties were the same as if administration had been granted immediately after the death of the infant, and accordingly that the legacy was barred.

(2) Page 253.

W. W. K.

In re BETHELL.
BETHELL *v.* BETHELL.

[1885 B. 3835.]

STIRLING, J.
1887
Jan. 11, 13, 17.

Administration Action—Claim to be a Creditor for Moneys lent, &c., and upon a Cheque, undated—Acknowledgment of Debt—Statute of Limitations—"Time," when beginning to run—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61).

In an action commenced in 1885 for the administration of *C. B.'s* estate, on inquiries for creditors, *A. J. P.* brought in a claim to be paid a sum of £541 16*s.* 7*d.*, which, as to £441 16*s.* 7*d.* was for commission and moneys lent before March, 1878, and which, as to £100 was for payment of a cheque, undated, given by *C. B.* in March, 1878, and accepted by *A. J. P.* in discharge of a larger sum. *C. B.* was sent to the *Cape of Good Hope* in March, 1878, and died there in 1884. He, while on board ship, wrote a letter in which he asked *A. J. P.* to make out his account, and send it to him: "I will send it you as soon as possible." The account was sent in March, 1878, and *C. B.* afterwards wrote letters to *A. J. P.* in which he said, "I will send you a cheque as soon as I can" and "I will send some coin home as soon as ever I can":—

Held, that as to the £441 16*s.* 7*d.* there had not been an acknowledgment sufficient to enable the Court to infer an absolute promise to pay.

As to the cheque, *C. B.* had not at the time of drawing it sufficient moneys at his bank to meet it, and was negotiating a loan, which he expected shortly to complete, out of which the cheque would be paid. The loan was not completed. *A. J. P.* was informed of that fact. The cheque remained undated and was never presented for payment.

Held, that the *Statute of Limitations* barred the claim, as the six years began to run when the letter was received stating that the loan would not be completed, and had long since elapsed.

THIS was a motion on behalf of Mr. *A. J. Padgen* that an order made in Chambers upon the 20th day of December, 1886, whereby his claim to be a creditor of the late Mr. *Christopher Bethell's* estate for the sum of £541 16*s.* 7*d.* was disallowed might be discharged, and that he might be declared, and allowed to be a creditor for that sum.

In March, 1878, Mr. *Christopher Bethell* went in the steam-ship *Danube* to the *Cape of Good Hope*, where he remained until his decease, which took place in July, 1884. The action, which was for the administration of his estate, was commenced by his legal

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personal representative in 1885, and a judgment for that purpose was given in October, 1885.

Mr. *Padgen*, under the inquiry directed as to creditors, brought in a claim for the above sum. As to the sum of £441 16*s.* 7*d.*, it was in respect of a simple contract debt which had accrued due before, and at the commencement of 1878, for commission and for moneys lent; and as to the sum of £100, it was in respect of an undated cheque drawn by *Christopher Bethell* upon the *Imperial Bank*, and given to Mr. *Padgen*, before the same time, for payment of a sum of £102 5*s.* 6*d.* The claim was objected to by the Plaintiff on the ground that it was barred by the *Statute of Limitations*. The evidence as to the £441 16*s.* 7*d.* was that Mr. *Padgen* was a turf commission agent; that he had been employed by Mr. *Christopher Bethell* in betting transactions; and that the sum was due on the balance of the account, and for moneys lent.

Mr. *Christopher Bethell* being considerably indebted in the early part of 1878 attempted to raise a sum of money upon a post-obit bond. That fact coming to the knowledge of his father he interfered, and opposed it, and the result was that the loan was not effected. Mr. *Christopher Bethell* having, at the time, no means of paying his debts, wrote to Mr. *Padgen*, apparently in February, 1878, a letter in which he informed him that his father had been told all about the loan, and said:—"I at once put off the concern till things cool down, as now we can say that we have not borrowed any money. I will let you have some the moment it is safe to do it." Mr. *Christopher Bethell* was, in March, 1878, sent to the *Cape of Good Hope* by his father, and when on board the *Danube*, bound for the Cape, he wrote to Mr. *Padgen* thus:—"I have been bundled off to the Cape for a year on the shortest notice by an infuriated parent. Will you make out your account, and send it to me, addressed: Post Office, *Durban, Natal*. I will send it you as soon as possible—send your account next week. Mail every Thursday." To Mr. *Christopher Bethell* the account was in March, 1878, sent, and he afterwards wrote to Mr. *Padgen* a letter from *Cape Town*, dated the 8th of May, 1878, in which he said: "I will send you a cheque as soon as I can." On the 11th of July, 1878, he again wrote to Mr. *Padgen* thus: "I will send some coin home as soon as ever I can."

As to the cheque for £100, the evidence was that Mr. *Christopher Bethell*, before leaving this country, drew it upon the *Imperial Bank*, and gave it to Mr. *Padgen*, undated, in payment of an aggregate sum of £102 5*s.* 6*d.*, not included in the £441 16*s.* 7*d.* The reason given why the cheque was not dated was that Mr. *Christopher Bethell* had not at the time of drawing it a balance at the bank sufficient to meet the payment, that he told Mr. *Padgen* that he expected a loan of money which he was negotiating to be shortly completed, and that as soon as it was he would have sufficient money at the bank to meet the cheque, and would then telegraph to him, and he was thereupon to fill in the date of the cheque and obtain payment.

Mr. *Padgen* accepted the cheque in full discharge of the £102 5*s.* 6*d.* The loan of money was alleged to be on the post-obit bond before mentioned. The cheque was, in consequence of the statement made to Mr. *Padgen*, never presented by him for payment.

It was stated in Court that a sum of about £600, arrears of rents due at the date of Mr. *Christopher Bethell's* death, in respect of an estate of which he was tenant for life had been paid in to the credit of the action; and it was also stated that at his death his debts were considerably more than that sum.

W. F. Hamilton (*Henry Kisch* with him), for the motion, submitted that as to the sum of £441 16*s.* 7*d.* the letter written on board the *Danube* constituted a sufficient acknowledgment for which an absolute promise to pay might be inferred. He contended that the letter was written out of the jurisdiction, and therefore there was a contract to pay made out of the jurisdiction, and being so made it was not so much a question of time not applying, as that the *Statute of Limitations* never began to run; and he also contended that each of the letters of the 8th of May, and of the 11th of July, 1878, was a sufficient acknowledgment. *Tanner* v. *Smart* (1) was distinguishable. The meaning of the letter written on board the *Danube* was that the writer could not pay at that time because he was on board ship, and had not an opportunity of sending the money, but that he would pay as soon

(1) 6 B. & C. 603.

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as he arrived at the *Cape*. If that were not so, then the meaning was that he would pay as soon as he got the account for which he asked to be sent to him, and knew what the amount due was. There was, moreover, evidence of the ability of Mr. *Christopher Bethell* to pay within the meaning of the decision in *Tanner* v. *Smart* (1). As to the cheque, the claim was not barred because time would not begin to run against Mr. *Padgen* until he presented the cheque for payment, which he did not do, or at all events, until he filled in the date, which he had authority to do. The case of *Chasemore* v. *Turner* (2), which might be referred to, somewhat resembled this case.

Henry Sutton, for the Plaintiff, the legal personal representative:—

[STIRLING, J.:—I do not want to hear you upon the question of acknowledgment, but only as to the cheque.]

The arrangement as to the cheque was set forth in Mr. *Padgen's* affidavit where he referred to the negotiation for raising money upon a post-obit bond, and which, through the father's intervention, went off. The basis of the arrangement was in consequence gone. The money was not raised, and there was no fund out of which to pay the cheque. It was admitted that a cheque might be given for payment at a future time, and until that time came the statute would not begin to run, but in this case it began to run when it was sent to Mr. *Padgen;* for as the arrangement could not be carried out he was remitted to his rights as they existed when the cheque was given, and he could have presented it at any time within six years: *Byles* on Bills (3); *Norton* v. *Ellam* (4); *Robinson* v. *Hawksworth* (5); *Alexander* v. *Burchfield* (6). At any rate time began to run when Mr. *Padgen* received the letter of February, 1878, whereupon presentation of the cheque was excused.

Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 26 and 64, sub-s. 2.

W. F. Hamilton, in reply.

(1) 6 B. & C. 603.
(2) Law Rep. 10 Q. B. 500.
(3) 14th Ed. pp. 285–358.
(4) 2 M. & W. 461.
(5) 9 Q. B. 52.
(6) 7 Man. & G. 1061.

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As to the cheque, I will look at the authorities, but the claim for £441 16*s.* 7*d.*, I can dispose of at once. [His Lordship then stated the facts of the case, and continued:—] This was a simple contract debt, which accrued due in the commencement of 1878. To the claim made for payment, the Plaintiff, the executor, has pleaded the *Statute of Limitations*, and the Claimant, Mr. *Padgen*, is compelled to rely upon certain acknowledgments which he has alleged were given by the deceased out of the jurisdiction. They were all given more than six years ago, and there is no doubt that two of them were given out of the jurisdiction. The case has been argued on the footing of the law as laid down by Lord Justice *Mellish* in the case of *Mitchell's Claim* (1). The question upon these acknowledgments is whether there is in any of them such an admission as that an absolute promise to pay may be inferred. I am of opinion that there is not. As regards the first letter, it has not been proved to my satisfaction that it was written out of the jurisdiction. It may very well have been written on board the ship *Danube* while in English waters, and if I were at liberty to guess, I should come to the conclusion that it was so written, and was sent on shore, and posted within the jurisdiction. If that be so it was not an acknowledgment which would take the case out of the *Statute of Limitations*. But apart from that it seems to me, looking at the terms of it, that it is not a letter from which an unconditional promise to pay can be inferred. If it had stopped at the words, "will you make out your account," the case might have been otherwise; but it goes on, "I will send it you as soon as possible." What does that mean? It was suggested that it might mean, "I will send it you as soon as I can; I cannot do so now because I am on board ship, and have no means of sending you the money." Or, it was suggested, the meaning might be, "I will send it as soon as I get your account and know what the amount is." That is a possible meaning, but in interpreting the letter I am entitled to look at the surrounding circumstances. I have no doubt that he meant, "I have not got the money to pay you now and am leaving the country, but send the account, and as soon as I have money

(1) Law Rep. 6 Ch. 822.

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to pay you I will do so." The case falls within the decision in *Tanner* v. *Smart* (1), where the words are, "I cannot pay the debt at present, but I will pay it as soon as I can." It was held there that the acknowledgment was not sufficient to take the case out of the statute without proof of the defendant's ability to pay.

Now is there here any proof of the deceased's ability to pay? There is none at all. There was a suggestion that he could pay, because there is a sum of £600 in Court, but that sum, upon inquiry, turns out to have arisen from arrears of rent which were due to the deceased at the time of his death, and which never came to his hands. It seems to me therefore upon that letter, that, even if it was written out of the jurisdiction, it was not sufficient acknowledgment, and that the Claimant cannot succeed. The two other letters, which were unquestionably written out of the jurisdiction, are less favourable to the Claimant. The letter of the 8th of May, 1878, is almost exactly in the same words as were used in *Tanner* v. *Smart*, and the language of the letter of the 11th of July, 1878, is not distinguishable. Therefore the claim as to the £441 16*s.* 7*d.* fails. I will dispose of the claim in reference to the cheque upon Monday next.

1887. Jan. 17. STIRLING, J. (after stating the facts, continued):—

If the claim be treated as founded on the cheque alone, which was undated, then it was a cheque payable on demand, and the cases which have been cited on behalf of the Plaintiff of *Norton* v. *Ellam* (2) and *Robinson* v. *Hawksworth* (3), and in particular the judgment of Mr. Justice *Patteson* in the latter mentioned case, shew that such a cheque ought to have been presented within six years from the time when it was given, and that the time under the *Statute of Limitations* began to run when the cheque was sent to the Claimant before the deceased left this country, and consequently the six years have long since elapsed. It was moreover suggested that the contract was only to pay if the loan was completed; but the loan never was completed, and therefore if that view be correct, the claim must fail. The most

(1) 6 B. & C. 603. (2) 2 M. & W. 461.
(3) 9 Q. B. 52.

favourable way in which the case could have been put for the Claimant was that the cheque was sent to and accepted by him, upon an arrangement that he should wait, and not present it until a reasonable time had elapsed, in order that the loan which was then in negotiation should be completed, and the drawer of the cheque should be put in possession of funds to meet it. If that were so, then immediately on the receipt of the letter of February, 1878, a right of action arose, for the Claimant was not bound to wait any longer, but might at once have presented the cheque for payment. It was said that time would not begin to run until the presentment of the cheque, but I think that the cases to which I have referred, shew that that is not so, and that the time began to run when the right of action arose. But even if in an ordinary case time would not begin to run until presentment, I think it is not so here, because there was no obligation to present the cheque. The *Bills of Exchange Act*, 1882 (45 & 46 Vict. c. 61), although it does not govern this case may, as was said by Lord *Blackburn* in *M'Lean* v. *Clydesdale Banking Company* (1), be accepted as declaratory of the prior law. By sect. 73 of that statute it was enacted that "a cheque is a bill of exchange drawn on a banker payable on demand," and "except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque." Then by sect. 45, sub-sect. 2, "where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable" . . . . And then sect. 46, sub-sect. 2, provides that "presentment for payment is dispensed with," (*c*) "as regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented." That is in accordance with the cases previously decided of *Terry* v. *Parker* (2) and *Wirth* v. *Austin* (3). It seems to me, therefore, that in this case presentment was excused, and the right of action accrued at once upon the receipt of

(1) 9 App. Cas. 95, 106. (2) 6 A. & E. 502.
(3) Law Rep. 10 C. P. 689.

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the letter of February, 1878. Then it was suggested that the cheque was undated. But, according to the Claimant's own statement, he had power to fill up the date, and he cannot, after he has permitted six years to elapse, be allowed to fill it up now any more than he could present it. Therefore, the claim wholly fails, and the application must be refused with costs.

Solicitors: *Alexander Pope; A. R. Oldman*, agent for *H. W. Bainton, Beverley.*

T. F. M.

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Feb. 7, 8.

[1886 W. 634.]

Specific Performance—Non-mutuality—Power to withdraw—Land indefinite—Land belonging to Another—Statute of Frauds—Two Letters forming Contract—Parol Evidence.

A proposal had been made that the two Plaintiffs should buy a triangular field of about three acres, and that the Defendant should buy half an acre of it from them. One of the Plaintiffs and the Defendant met on the field; the Defendant wished to have a piece in one of the angles, and the Plaintiff stepped so as to mark out where a base line would cut off half an acre. Some days afterwards the same Plaintiff wrote to the Defendant asking her to let them have a letter agreeing to purchase the half acre she had selected for £350. She wrote back, not expressly referring to the other letter, that she was willing to take half an acre of the land as agreed upon for £350. The Plaintiffs did not obtain a contract with the owner of the land for the purchase until the 4th of November, which was three months afterwards. On the 13th of November the Defendant threatened to withdraw, and on the 20th of November her solicitors wrote that she did withdraw from the contract:—

Held, that the small element of uncertainty in the measurement of the land might be disregarded, and that the parties must be considered as having determined the exact piece of land to be taken:—

Held, that the second letter contained a sufficient reference to the first; and that the two letters formed a valid contract within the *Statute of Frauds*:—

Held, that though the two Plaintiffs were the purchasers of the land, and the letters forming the contract passed between the Defendant and one only of the Plaintiffs, he must under the circumstances be considered as agent for the other as well:—

Held, that the doctrine of non-mutuality being a bar to specific performance, does not apply to a contract which to the knowledge of both parties cannot be enforced by either until the occurrence of a contingent event, and therefore:—

Held, that though the Defendant might have withdrawn at any time before the 4th of November when the Plaintiffs first became able to perform their part, she could not withdraw afterwards.

IN the year 1885 Mrs. *Dunn*, the Defendant in this case, wished to take or build a house at *Enfield*, and applied to Messrs. *Wylson & Long*, who were architects and surveyors there. After other proposals they suggested that she might buy and build on a piece of a field belonging to one Mr. *Hollington*, and negotiations were begun with his agents.

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On the 11th of July, 1885, Mr. *Wylson* met Mrs. *Dunn* on the field, and she, as Messrs. *Wylson & Long* alleged, and as the Court held, then selected half an acre of the field. The circumstances and what took place on that occasion are stated in the judgment. Mr. *Hollington* seemed to have asked more than Mrs. *Dunn* was willing to give, but proposed to sell the whole field for £1050. It was then proposed that Messrs. *Wylson & Long* should buy the whole field, and sell to Mrs. *Dunn* a part of it for £350.

On the 31st of July, 1885, a letter was sent to Mrs. *Dunn*, written on the office paper of *Wylson & Long*, as follows:—

"Dear Madam,—I regret having been away from home when you called, but did not expect you till the afternoon. The revised plans shall be forwarded as you desire, if possible, by to-morrow afternoon. The negotiations for purchasing the land are progressing. It will facilitate matters if you will kindly let us have a letter from you agreeing to purchase the half acre you have selected from us for £350.

"I remain, dear Madam, yours faithfully,

"*Oswald C. Wylson.*

"Mrs. *Dunn.*"

On the 4th of August Mrs. *Dunn* sent a letter, as follows:—

"Dear Sir,—I am willing to take ½ acre (half an acre) of the land on *Lavender Hill*, at the top of the field, as agreed on, for the sum of £350.

"Truly yours,

"*A. Wylson*, Esq." "*E. Dunn.*

Many letters passed between Mrs. *Dunn* and Mr. *Wylson*; and between Mr. *Hortin*, the solicitor of Messrs. *Wylson & Long*, and Messrs. *Mason & Edwards*, the solicitors of Mrs. *Dunn*, the important parts of which are referred to in the judgment; and negotiations went on with Mr. *Hollington*. A final contract for the sale of the land by Mr. *Hollington* to Messrs. *Wylson & Long* was made on the 4th of November, 1885, of which Mrs. *Dunn's* solicitors were informed on the 5th of November by a letter stated in the judgment. Mrs. *Dunn* had raised some objections as to the supply of water to the house she proposed to build, and on

the 13th of November her solicitors wrote to the solicitor of Messrs. *Wylson & Long* that she should "withdraw from the protracted negotiations for the purchase of the property unless a definite arrangement is made for an adequate supply of water."

And on the 20th of November her solicitors wrote simply:—"Our client, Mrs. *Dunn*, instructs us to state that she declines all further negotiations hereon."

After more correspondence as to water, and as to two trees which Mrs. *Dunn* alleged to be within the half acre, and after attempts to arrange matters, Messrs. *Wylson & Long* brought this action against Mrs. *Dunn* for specific performance.

The Defendant pleaded that there was no contract within the *Statute of Frauds*; that there was no mutuality in the contract; and that she had not selected the particular half acre.

The action now came on for hearing.

The Plaintiff *Wylson* and the Defendant, and other witnesses, were examined, and evidence was given that *Wylson* was acting for the firm of *Wylson & Long*.

Warmington, Q.C., and *Farwell*, for the Plaintiffs:—

The letters of the 31st of July and 4th of August constitute a complete contract signed by Mrs. *Dunn*. Parol evidence must always be admitted to shew what is the land bought, and here the land has been clearly marked out.

Barber, Q.C., and *Upjohn*, for the Defendant, Mrs. *Dunn*:—

These two letters alone constitute no contract, nor can it be picked out from the correspondence. At the time *Wylson* had none of the land, and it was a mere speculation which she was asked to join in: *Sugden* on Vendors and Purchasers (1). Even if the letters formed a contract she could have at any time before conveyance to the Plaintiffs withdrawn: *Forrer* v. *Nash* (2), and cases in *Fry* on Specific Performance (3). It may be that *Wylson & Long*, if they had gone to any expense, might have recovered the amount from her, but it is no case for specific performance. There was no mutuality, as she could not have forced them to buy the land, and without mutuality there can be no specific

(1) 14th Ed. p. 217. (2) 35 Beav. 167.
(3) 2nd Ed. p. 202.

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performance: *Brewer* v. *Broadwood* (1). *Hoggart* v. *Scott* (2) illustrates the rule. But in fact the negotiation never went beyond a treaty: *Hussey* v. *Horne-Payne* (3).

If the contract was binding *Wylson* might have been liable for damages if he did not succeed in buying the land. Did he intend that? It was a contract voidable until confirmed, and it is clear from the letters that the Plaintiffs knew there was no binding contract.

Another ground of defence is that the contract was not with *Wylson & Long*, the Plaintiffs, but with *Wylson* alone, and he had no authority to sign for himself and *Long* so as to bring it within the *Statute of Frauds*: *Potter* v. *Duffield* (4).

Besides, the letters do not contain all the terms agreed upon: and the land is not defined: *Peirce* v. *Corf* (5); *Rishton* v. *Whatmore* (6); *Boydell* v. *Drummond* (7).

KEKEWICH, J.:—

I have made up my mind, and I propose to give judgment without calling on Mr. *Warmington* for a reply.

The Defendant contends that she is not bound to purchase a piece of land situate at *Enfield*. The proceedings do not disclose the reason why she desires not to purchase the piece of land—possibly she does not wish now to build there or to live in that neighbourhood, but it is immaterial to me why that state of things has been brought about. If she is bound to purchase the piece of land her wish to get rid of it will not avail her. If, on the other hand, she is not bound to purchase the piece of land, no consideration of her reasons ought to influence the Court or will influence the Court.

A great many points have been raised, and I must deal with them in their order. [His Lordship then stated the facts which led to the meeting of Mr. *Wylson* and Mrs. *Dunn* on the field.] The piece of land was triangular, containing altogether close upon three acres, and it was bounded on the upper side by

(1) 22 Ch. D. 105.
(2) 1 Russ. & My. 293.
(3) 4 App. Cas. 311.
(4) Law Rep. 18 Eq. 4.
(5) Ibid. 9 Q. B. 210.
(6) 8 Ch. D. 467.
(7) 11 East, 142.

Lavender Hill, which appears to be the principal road, and on the other side by the *Upper Gordon Road*. Mrs. *Dunn* eventually preferred a site at the top of the field. One question was whether it should be a quarter of an acre or half an acre; and Mr. *Wylson* on the ground "footed" or stepped out, on the one side only, probably the *Lavender Hill* side, what would make a quarter of an acre, and then did the same with regard to half an acre. It was not measured in any way—it is not pretended by Mr. *Wylson* that there was anything at all approaching to actual measurement, and he might no doubt be some yards wrong, even though an expert in such matters. But it was ascertained that the line was to be taken across from one side to the other, from the point at which his stepping, supposing it to be accurate, ceased. [His Lordship then stated his reasons for concluding, on the evidence, that Mrs. *Dunn* determined to have half an acre taken from the top and measured by a base line cutting off a triangular piece out of the larger triangle.] The exact spot from which the line is to be drawn must be matter of measurement, introducing such a very small element of uncertainty, that I think I may disregard it, and say that then and there Mr. *Wylson* and Mrs. *Dunn* determined the exact piece of land which she was willing to take for the purpose of building her house upon. No doubt a discussion arose afterwards respecting two trees, and it may be that Mrs. *Dunn* afterwards thought that both those trees were to be included; whether she took her chance of the trees being included I do not know, or whether she did not attribute so much importance to them as she afterwards did, but I think the half acre was distinctly specified.

That being so, there was another interview on the 21st of July, and by that time it had turned out that the purchase could not be made on the terms proposed. A suggestion was then made by Mr. *Wylson* (no doubt the suggestion in the first instance came from him) that he or his firm should buy the whole property for £1050, and that then Mrs. *Dunn* should buy from him or the firm the half acre she had already fixed upon. Under those circumstances Mr. *Wylson*, writing from the office of his firm and on the firm's paper, writes to Mrs. *Dunn* the letter of the 31st of July. [His Lordship read the letter.] Mr. *Wylson* knew and

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Mrs. *Dunn* knew that she had already agreed to take that half acre for £350 if Mr. *Wylson* could complete that purchase, but he wanted a letter to that effect. On the 4th of August—the interval may perhaps be explained by the fact that the Bank Holiday intervened—Mrs. *Dunn* writes back, "I am willing to take half an acre of the land on *Lavender Hill* at the top of the field as agreed on for the sum of £350."

Before going further I must deal with the question which has been raised, whether those two letters constitute between them a memorandum within the *Statute of Frauds* sufficient for the purpose of this action. In the first place, I have to consider whether I can look at the two letters at all. It has been urged with considerable force that I cannot do so. No doubt you may have a contract by any number of letters or documents. No doubt also they must be so connected that you may be able to read them together and say that they are substantially part of one document. The objection as regards these two letters is, that it is not the case here. But in the first place, there is this identity between them, that Mrs. *Dunn* writes to Mr. *Wylson*, who had addressed her on the 31st of July, and says that she is willing to take half an acre of the land on *Lavender Hill* (the former letter having reference to the purchasing of the land), and she mentions the price (£350), which is the price mentioned in the former letter. Now is that enough to identify them? I am referred to the case of *Peirce* v. *Corf* (1), a case of considerable distinction from this, but still an instructive case, which cannot be passed over. In that case Mr. Justice *Quain* says this (2): "Therefore on the document itself there must be some reference from the one to the other, leaving nothing to be supplied by parol evidence except the identity, as it were, of the document," and it might be assumed from that passage, and one or two paragraphs of Mr. Justice *Blackburn's* judgment, that there must be some reference such as "in reply to yours of the 31st," or something of that kind. But Mr. Justice *Archibald* puts the case on a broader, and, to my mind, a more intelligible ground. He says (3): "I think it is quite clear there must be,

(1) Law Rep. 9 Q. B. 210. (2) Law Rep. 9 Q. B. 217.
(3) Law Rep. 9 Q. B. 218.

to satisfy the statute, either a written contract complete in itself, or a contract in writing on different papers, referring to each other in such a manner as to shew they are parts of the same contract. No doubt the reference may be made in various ways, but it must be of such a nature as to make it clear that the one does refer to the other; and on that point there seems to me to be a failure here to connect these two documents together." Therefore the reference may be a matter of inference—that is a matter of fair and reasonable inference—but there need not be an express reference from one letter to the other. Now, is there anything here from which I can say that there was a reference from one letter to the other? I read this letter of the 4th. "Dear Sir,—I am willing to take." Is that an offer? As I read it, taking the language to be used in the ordinary way in which language is used, that is in reference to some offer previously made—it is not an offer to buy, but "I am willing to buy," meaning, as a fair inference, and as I think, "I am willing to do that which you have suggested." Then she says "the land on *Lavender Hill*," pointing to some land mentioned before, and mentions the price as agreed on. I will not emphasise the definite article, because I do not think that is so important as the expression, "I am willing to take;" but reading the letter as a whole I think there is quite enough to justify the Court in referring to the letter of the 31st of July, and having got that letter referred to, I think the two between them constitute a contract within the *Statute of Frauds*.

An argument was based on the fact that Mr. *Wylson* signed the letter of the 31st of July, and is the person addressed in the letter of the 4th of August, but was not the vendor (even apart from the fact that the land was Mr. *Hollington's* at that time), and that *Wylson & Long* were the vendors. *Wylson & Long* are referred to in the letter of the 31st of July, and probably that would be enough; but apart from that, I think that after the case of *Morris* v. *Wilson* (1), and the judgment of Sir *George Jessel* in *Commins* v. *Scott* (2), it cannot be doubted that so long as you have a contract binding the person who signs, it is immaterial that the person who signs is in fact an agent and

(1) 5 Jur. (N.S.) 168. (2) Law Rep. 20 Eq. 11.

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not a principal, and that then, having brought the contract within the *Statute of Frauds*, you may prove by parol evidence, not only that there is a principal, but who that principal is. So, having certainly got the other necessary elements of the contract (because, as I have already held, the half acre had been selected), I think that those two letters between them constitute a contract within the *Statute of Frauds*, if I may look at them and not go beyond them.

But I must go beyond them. It was held in *Hussey* v. *Horne-Payne* (1) (although, as explained by the Master of the Rolls in *Williams* v. *Brisco* (2), not for the first time), that you are bound to look at all the circumstances of the case. You must go into all that passed, not only in letters, but in conversation. I must, therefore, not only look at what passed before, about which I need say no more, but at what passed afterwards between these parties, to see whether there was by means of these letters (which might have been in form a concluded contract) really any such contract or whether there was not intended to be anything more than intended negotiation? I do not propose to go through all the letters. Mr. *Upjohn* has criticised them very closely, and made many remarks which are deserving of my best attention; but notwithstanding all his remarks I do not think the evidence of mere intention in this case, or of mere negotiation, is sufficient to displace the *primâ facie* conclusion at which I have arrived with regard to the two letters of the 31st of July and the 4th of August. [His Lordship then read and commented on several of the letters.] Therefore, accepting *Hussey* v. *Horne-Payne* as a binding rule, and looking into everything that passed, all the evidence shewn by the correspondence and shewn by the interviews, and what we have heard in the witness box, I think the parties cannot now be allowed to say, and Mrs. *Dunn* cannot be allowed to say, that this matter rested in negotiation all through the autumn of 1885 until the 4th of November or the 13th of November. I think there was a binding contract, and that she is bound by it.

Now comes the question, which has been much argued, of non-mutuality. It is a technical doctrine, but like many other

(1) 4 App. Cas. 311. (2) 22 Ch. D. 441.

technical doctrines, founded on common sense. It comes simply to this—that one party to a bargain shall not be held bound to that bargain when he cannot enforce it against the other. If the contract is not mutually enforceable it is a voidable contract; that is, it may be avoided as soon as the person who has a right to avoid it discovers that the cause or occasion for so doing occurs. The rule is stated by the Master of the Rolls in the case of *Forrer* v. *Nash* (1): "I am of opinion that when a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say 'I will have nothing to do with it.'" That was cited with approval by Mr. Justice *Fry* in *Brewer* v. *Broadwood* (2), and he simply lays down the same rule again.

What I have to consider is whether that rule is applicable to a case of this character? If a man contracts to sell an agreement for a lease, and it turns out that he has not got an agreement for a lease, the purchaser, when he finds that to be so, may say, "I will not enter into it; I am not repudiating the contract, for I never entered into it; I am entitled to be off and I am off; I have contracted to buy that which you have not to give, and therefore you cannot enforce any contract against me." That is one of the cases, and a very simple case. You might have such a case here if Messrs. *Wylson & Long* had contracted to sell this land not having bought it, and having no title to it. Mrs. *Dunn*, when she found that out, might have turned round and said, "I am off; you have contracted to sell me a piece of land to which you have no title, and I will have nothing to do with it." But then arises the question whether this power of avoidance for non-mutuality is applicable to the case where the non-mutuality is apparent in the first instance and is an essential part of the bargain? As I read this contract Messrs. *Wylson & Long* go to Mrs. *Dunn* and say, "We have not got this land; you know it belongs to Mr. *Hollington*, but if you will agree to buy from us half an acre for £350 we will purchase the whole." That, from the first is a case of non-mutuality, and the contract could not be enforced on either side. Until Messrs. *Wylson & Long* have

(1) 35 Beav. 171. (2) 22 Ch. D. 105.

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obtained that which they have agreed to sell, they cannot enforce it on Mrs. *Dunn* any more than Mrs. *Dunn* can compel them to convey that which they have not got. But the doctrine of non-mutuality—the doctrine that a purchaser may avoid a contract when he discovers that his vendor has not got that which he contracted to sell—seems to me altogether inapplicable to a case where the vendor in the first instance tells the purchaser, and the purchaser knows from all the circumstances of the case, that the vendor has no title, and is not likely to have one for some time.

But I now go to what is a still more important point. Is not such a contract as I have just described determinable by the purchaser on notice? I think it is. I think that a purchaser having entered into such a contract as I have suggested, is entitled at any time to say, "You have not got that land yet. I hoped you would have got it by this time; I do not care now to have the land, and I determine the contract." If, in the meantime, the vendor had incurred expense, it may be that he would have a right of action against the purchaser for expenditure incurred and labour bestowed at the purchaser's request; but that is not specific performance. The purchaser might, I think, in the case I am suggesting, get off the contract by notice and say, "You are not in a position to convey or to perform your contract, and therefore I am off." But when must that notice be given? Must it not be given some time before the vendor gets that which enables him to perform his contract? Must not the purchaser be active, and bring the matter to an end before it has been brought to an end on the other side. That is certainly my conviction as to the rule applicable to such a case. If I agree to pay such a sum as an arbitrator fixes, until the arbitrator has fixed it I cannot be sued for the money, because there is a blank in the contract which has not been filled up; but when once the sum is fixed, there is a contract in which the blank has been filled up and the time for repudiation has gone. In order to ascertain how that doctrine applies in this particular case, I must look again at some of the circumstances and at one or two of the letters. The correspondence went on, some of it dealing with the structure of the house, some with the drainage, some with the

water, some with the trees, but it went on more or less uncomfortably until the 4th of November. On the 4th of November Messrs. *Wylson & Long* at last concluded the contract with Mr. *Hollington*. I am clear that up to that time they had no concluded contract with Mr. *Hollington*. It is true that on the 10th of August Messrs. *Wylson & Long* sent £105, or 10 per cent., by way of deposit on the agreed purchase-money of £1050 agreed between them and the accountant; but the letter of the 11th of August, acknowledging the £105, shews distinctly he did not accept that as a binding contract then between him and his principal; because he says, while receiving the £105, "I have written to my client, Mr. *Hollington*, on the subject." He did not suppose then they had authority to bind the sale of the whole property for £1050, and up to that time it was matter of negotiation; and after that difficulties arose as regards the title to be deduced and so forth. Therefore I do not think it can be argued with any chance of success that there was a binding contract between Messrs. *Wylson & Long* on the one hand and Mr. *Hollington* on the other, until it was reduced to a complete form on the 4th of November. On the 4th of November it is reduced into a complete form—not so as to bind Mrs. *Dunn* according to all its terms, but to bind her in this sense, that then Messrs. *Wylson & Long* had in equity got the property. They had got a contract which they were entitled to enforce as against Mr. *Hollington*, and, therefore, I think they could also enforce their contract as against Mrs. *Dunn*.

On the 5th of November, Mr. *Hortin* writes to Messrs. *Mason & Edwards*, Mrs. *Dunn's* solicitors, the letter which has been properly though severely criticised. "There is I think" (I leave out the word "in" which probably is a mistake) "now a binding contract with your client—I have exchanged contracts with the owner, and have the contract." If Mr. *Hortin* knew what I give him credit for knowing, that at any rate until he had got the land in equity, and made his clients the owners in equity of the whole property, he could not enforce the contract against Mrs. *Dunn*, that letter is a most intelligible and clear statement of the position of the parties. That is not met on the other hand by anything at all like a repudiation, although I think it would

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have been too late; but on the 13th of November, Messrs. *Mason & Edwards* write that Mrs. *Dunn* says she will withdraw unless a distinct arrangement for the supply of water can be given. On the 20th of November she does what she ought to have done much earlier if she wished to get off, and they write: "Our client, Mrs. *Dunn*, instructs us to state that she declines all further negotiations hereon." It is not till the 20th of November that she cries off—then she says, "I do not intend to perform this contract, and you cannot enforce it against me." I hold that that was too late. I think she might have done it probably on any day up to the 4th of November, but I think at that time Messrs. *Wylson & Long* had performed their part of the original contract that they would let her have half an acre if they could buy the rest of the land; or, to put it in the other way, that they would buy the rest of the land if she would take the half acre. To my mind, you may call it an offer, you may call it a promise, but whether it is an offer or a promise, it takes the contractual form. I think it is an offer or promise into which the element of contract enters. It is one which may be converted into a binding contract by the completion on the part of the vendors of their part of it, which was completed on the 4th of November. They had then done what was required of them, and I think they were entitled to enforce the contract. It comes back no doubt to the same result as that of repudiation for want of mutuality; but I think the principle is entirely different. We have been very familiar for the last ten or twenty years with questions of contracts for taking shares in joint stock companies. A man applies for a certain number of shares, he applies probably by a document in the ordinary form in which he agrees to accept that or any less number of shares. Next day he thinks better of it, and writes and says, "I withdraw my application." Is he entitled to do that or not? The company have offered the shares to those prepared to apply, but have not bound themselves to allot shares to any particular individual, and they are not finally bound; he on the other hand has expressed his willingness to take the number of shares allotted to him; but until the acceptance has been received, that is to say, until sent in such a way that he is bound by it, until

the shares are allotted, he is entitled to be off, but after that moment he cannot get off. The question is, what is the moment? Here I think the moment was the 4th of November, when the contract with Messrs. *Wylson & Long* was entered into. Then they were in a position to say, "We agreed with you that we would purchase this land, and let you have the particular half acre for £350; you agreed with us that if we purchased the whole three acres, you would take the particular half acre and pay £350 for it; we have performed our part of the contract, and you must perform yours." I think they were entitled to take up that position, and I think they did. The repudiation did not come till afterwards, and I think that it was too late.

Therefore, there must be judgment for specific performance, with the usual reference as to title.

The costs up to and including the trial of course will follow the result.

Solicitor for Plaintiffs: *J. H. Hortin.*

Solicitors for Defendant: *Mason & Edwards.*

C. M.

C. A.
1886
Dec. 7, 9, 10, 11, 13, 20.

NEWBIGGING *v.* ADAM.

[1884 N. 1197.]

Rescission of Contract—Indemnity—Partnership.

A person who has been induced to enter into a contract of partnership by misrepresentations not such as would entitle him to bring an action of deceit for damages, has a right, on the contract being rescinded by the Court, to be indemnified against the debts and liabilities of the partnership. This is not giving damages, but is the proper consequence of rescinding the contract.

The nature and extent of the right to indemnity on rescission of a contract considered.

IN November, 1882, the Defendant, *Walter Townend*, was carrying on business as a worsted spinner under the firm of *Walter Townend & Co.* The Plaintiff alleged that, practically, the Defendants *Alexander Adam* and *Robert Smith Adam* were entitled to the whole capital of the business, and that the business was carried on by them in partnership with *Townend*, though they were not ostensibly partners. The Defendants all denied this partnership, and insisted that *Townend* carried on the business alone, and that the *Adams*, from whom he had purchased a large part of the machinery and plant, were only creditors, but to an amount equivalent to the greater part of the capital. The Defendants all admitted that the *Adams* had, by agreement with *Townend*, a right to nominate a partner or partners to take a share in the business.

In November, 1882, the *Adams* entered into negotiations with the Plaintiff for admitting him as a partner into the business of *Walter Townend & Co.*, and an arrangement was come to, in consequence of which three agreements, dated the 21st of February, 1883, were entered into, the short purport of which was as follows:—

The first was an agreement between *Townend* of the one part and the Plaintiff of the other part by which *Townend* and the Plaintiff agreed to be partners in the business, under the firm of *Walter Townend & Co.*, from the 1st of February, 1883, to the

1st of September, 1896, unless previously determined as therein mentioned. That the then present capital was £10,000, the whole of which should be brought in by the Plaintiff; that the machinery, plant, and stock-in-trade should be valued, and the amount carried to the credit of the late firm. That the new firm should collect the debts due to the old firm, pay thereout the debts of the old firm, and carry the surplus (if any) to the credit of the old firm, the deficiency (if any) to be borne by the old firm. That *Townend* should have one third and the Plaintiff two thirds of the profits, and that whenever *Townend's* share exceeded £400 in any year, he should leave the surplus in the business till he had a capital of £5000. The agreement contained clauses under which, in certain events, *Townend* might acquire the power of purchasing the Plaintiff's share in the business.

The second agreement was between the Plaintiff of the one part, and the *Adams* of the other part, by which it was agreed that the Plaintiff should pay to the *Adams* a sum equal to half the net profits that should accrue to him from the partnership; and it was, among other things, agreed that any alterations that might be made in the first agreement should not, unless assented to by the *Adams*, affect their rights under the now stating agreement.

The third agreement was between *Townend* of the one part and the *Adams* of the other part, by which it was agreed that, in the event of *Townend's* acquiring the right under the first agreement to purchase the Plaintiff's share, he should consult the *Adams*, who should have the option of deciding whether the share should be purchased or not, and if they elected that it should, then they should be deemed the purchasers, and should be at liberty to transfer that share to their nominee, and that such nominee should take the place of the Plaintiff under the first agreement.

The Plaintiff, who was an officer in the army serving in *India*, gave up his commission, returned to *England*, entered into the business, and paid into the business at different times sums amounting to £9700, on account of the £10,000 which he had bound himself to provide, and he also paid in discharge of liabilities of the partnership, £324 2*s.* 7*d.*

The business proved unsuccessful, and on the 21st of Novem-

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ber, 1884, the Plaintiff commenced this action, alleging that he had been induced to enter into the partnership by untrue and unfounded representations made by the *Adams* as to the state of the business, and claiming (1) dissolution of the partnership or partnerships formed by the agreements; (2) an account of the partnership transactions, and a winding-up of the partnership affairs; (3) that the Defendants might be decreed jointly and severally to indemnify and might indemnify the Plaintiff against all claims and demands whatsoever in respect of the said partnership or partnerships, or any of the debts or liabilities thereof; (4) that the Defendants might repay the capital brought in by the Plaintiff, with interest at £5 per cent., the Plaintiff giving credit for any sums withdrawn by him from the partnership; or (5), in the alternative, damages for the misrepresentations; (6) a receiver.

The *Adams* put in a defence denying misrepresentations, and a counter-claim by which they alleged that the Plaintiff and *Townend*, as partners in the firm of *Walter Townend & Co.*, were indebted to them in £16,704 for money lent and goods sold, and that the business was insolvent, and claimed that sum and an injunction to restrain the Plaintiff and *Townend* from dealing with the assets of the firm except by distributing them rateably among the creditors, including the *Adams*, and (if necessary) a receiver.

Townend by his defence denied any misrepresentation by himself, and stated that he had no knowledge of the negotiations between the Plaintiff and the *Adams*, who had nominated a partner, as by agreement with him they were entitled to do.

The action was tried by Vice-Chancellor *Bacon*, who considered it to be established that the Plaintiff had been induced to enter into the partnership by misrepresentations, and on the 5th of May, 1886, gave a judgment dismissing the counter-claim with costs as against the Plaintiff, and without costs as against *Townend*. And the Court being of opinion that the partnership had come to an end, it was declared that the Defendants were jointly and severally bound to indemnify the Plaintiff against all outstanding debts, claims, demands, and liabilities which the Plaintiff had become or might become subject to, or be liable to pay for

or on account or in respect of the dealings and transactions of the partnership. It was declared that the Defendants were jointly and severally liable to repay to the Plaintiff £9279 6*s.* 1*d.*, being the balance of the sums brought in by the Plaintiff, with interest at £4 per cent. from the times when they were brought in up to the date of the judgment, after deducting the sums drawn out by the Plaintiff, with interest up to the same time. And the Defendants were ordered to pay this balance to the Plaintiff, with interest at the same rate from the judgment until payment. The Defendants were ordered to pay the Plaintiff's costs.

The *Adams* appealed from this judgment. *Townend* had not appeared at the trial, and did not join in the appeal, which was argued on the 7th, 9th, 10th, 11th, and 13th of December, 1886.

Rigby, Q.C., and *Haldane*, for the Appellants:—

On the evidence we say that the *Adams* neither were partners with *Townend*, nor represented themselves to be such. We say further, that the Respondent was put in full possession of all the circumstances of the business, and cannot be heard to say that he was misled. But suppose that misrepresentations were made, there is no allegation that the *Adams* knew what they were stating to be untrue, and this is an attempt to make them liable as in an action of deceit without alleging knowledge. The £10,000 was not paid to the *Adams*, but into the business of the new firm, in which the *Adams* were not partners, and they cannot be called upon to refund it. To make them pay money which they never received is giving damages, and this cannot be done in an action for rescission: *Redgrave* v. *Hurd* (1). The claim to indemnity stands on the same footing: it is making the *Adams* subject to liabilities to which they were not subject before the contract, and that is giving damages.

Sir *Horace Davey*, Q.C., and *J. G. Wood*, for the Plaintiff, were desired by the Court to confine themselves to the question of indemnity:—

The principle on which the Court acts when a contract is

(1) 20 Ch. D. 1.

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rescinded for simple misrepresentations not fraudulent is that the party who misleads is to put back the misled party into the position in which he was before the contract. The Appellants contend that the *status in quô* of both parties must be restored, but that is not quite accurate. It is true that as a general rule there must be *restitutio ad integrum*, but that rule is subject to exceptions. Thus there may be rescission of a contract of partnership after the firm has become bankrupt. A familiar instance is the case where a horse dies, so that he cannot be restored. In *Phosphate Sewage Company* v. *Hartmont* (1), a concession which formed the subject of the contract was voidable, and had in fact been avoided, yet the plaintiffs were held entitled to rescission. The true bargain between the Plaintiff and the *Adams* was that he should have one-third of the profits of the business, and the mode by which this contract was carried out is mere machinery, and does not affect the merits. It is immaterial what the title of the *Adams* was. In the present case it makes no material difference whether the misrepresentation was fraudulent or not. An action for damages for deceit may be brought against a person not a party to the contract, and it may be brought against a party to the contract without rescinding, the damages being reduced by the value of what the Plaintiff retains; but if he retains nothing, an action for damages and an action to rescind have the same result. *Rawlins* v. *Wickham* (2) furnishes the precedent for the decree in this case. An indemnity such as this is the only means of restoring the Plaintiff to his former position. *Redgrave* v. *Hurd* (3) has been cited against us, but it contains nothing to impeach the principle of *Rawlins* v. *Wickham*, that the right to rescind carries with it a right to be indemnified from the consequences of the contract which is set aside. We are not asking for damages *quâ* damages—the *quantum* may be the same, but that is only an accident—the damages in an action of deceit might be much larger, as indicated in *Redgrave* v. *Hurd*. The contention of the Appellants that they are only liable for such debts of the firm as would have been incurred if the Plaintiff had not joined the firm contradicts *Rawlins* v.

(1) 5 Ch. D. 394. (2) 1 Giff. 355; 3 De G. & J. 304.
(3) 20 Ch. D. 1.

Wickham (1). Moreover, on the evidence the *Adams* were either owners or partners before the Plaintiff joined, so they would have incurred the same liabilities if the Plaintiff had not joined.

Rigby, in reply.

1886. Dec. 20. COTTON, L.J. (after shortly stating the nature of the case, and discussing the evidence, stated the result to be that there was a substantial misstatement, though not made fraudulently, which induced the Plaintiff to enter into the contract into which he entered. His Lordship then proceeded):—

We have then to consider what are the consequences. The arrangement that was made was carried into effect by three deeds. One was a deed of partnership between the Plaintiff and *Walter Townend*, the second was an arrangement between the Plaintiff and the *Adams* that the Plaintiff should give to them one-half of the two-thirds profit of the new business which he was to get under the deed of partnership, and there was a third deed, to which I need not further refer, between the Defendant *Townend* and the Defendants the *Adams*. The material thing is this, that there was a deed of partnership between the Plaintiff and *Walter Townend*, and a contract between the Plaintiff and the *Adams* with reference to the disposal of the Plaintiff's share of the profits. There has been a great deal of argument as to whether the *Adams* are to be considered as partners in the new concern. That I do not decide, nor do I think it necessary to enter into the question whether the *Adams* were or were not principals or concealed partners in the previous business, though if it were necessary to decide it we all should come to the conclusion that they were either principals or concealed partners. Here was a contract carried into effect it is true by three deeds, but one contract alone, in which, although *Townend* may have assented to the arrangement which was proposed by the *Adams*, yet it was a contract all the terms of which were settled between the *Adams* and the Plaintiff. That being so, we must look upon the transaction as a whole, and not look upon the contract into which the Plaintiff entered with the *Adams* by the second deed as the whole

(1) 1 Giff. 355; 3 De G. & J. 304.

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of the contract between them. We cannot in my opinion separate the contract of partnership contained in the deed between the Plaintiff and *Townend* from the contract which was entered into between the Plaintiff and the *Adams*. We must look upon them as parts of one entire contract, and that contract, as the Plaintiff was induced to enter into it by misrepresentations, must be set aside. It is true that when a contract is set aside the person as against whom it is set aside is with some exceptions to be restored to his old position; but it was not much argued that this could not be done here. The contract to be set aside was the contract under which the Plaintiff became a partner in the new business with *Townend*, and if that business perished by its own weakness, in my opinion the mere fact that the business has come to an end, not by any default of the Plaintiff, does not prevent him within the terms of the rule from restoring the Defendants to the former state of things.

The Plaintiff, then, is entitled to be put back into his old position. How is that to be done? It was hardly argued that if the contract was to be set aside in consequence of misstatements made by the *Adams* the *Adams* could retain any benefit derived from the contract of partnership into which the Plaintiff had entered, and they clearly could not. They could not, as by their counter-claim it was sought to do, recover from the Plaintiff as a member of the new firm any portion of the indebtedness incurred by the Plaintiff and *Townend* to the *Adams* (treating them as not partners) during the carrying on of the business of the partnership into which the Plaintiff had been induced by the statements of the *Adams* to enter. Then, again, the moneys brought in by the Plaintiff were brought in to assist and support the business, and even if they did not go directly to pay any liabilities of the old business, the Plaintiff would be entitled, on the contract of partnership being set aside, to have paid back to him the sum which under that contract he brought into the business. But the Vice-Chancellor has given more. He has directed that there should be an indemnity given by the *Adams* to the Plaintiff, and the question is, Was he right in so doing?

Undoubtedly the statements made, as I have already stated,

by the *Adams* were not such as would enable the Plaintiff to recover damages in an action of deceit, and Mr. *Rigby* contended that it would not be right in an action of this kind to make the Defendants, whose misstatement had enabled the Plaintiff to set aside the contract, undertake liabilities for which they were never subject antecedently to the contract, for that this was really giving damages in another way. I differ from that proposition. In my opinion it is not giving damages in consequence of the deceit, it is working out the proper result of setting aside a contract in consequence of misrepresentation. This is a very different thing, because although the damages which would have been obtained in an action of deceit if the misstatement had been made fraudulently, or with such reckless negligence as to bring about the same consequences, might have been the same as what the Plaintiff will get under the indemnity, they might have been much more. The Plaintiff here does not recover damages as in an action of deceit, but gets what is the proper consequence in equity of setting aside the contract into which he has been induced to enter. In my opinion it cannot be said that he is put back into his old position unless he is relieved from the consequences and obligations which are the result of the contract which is set aside. That is a very different thing from damages. The Plaintiff may have been induced by these misstatements to give up a commission in the army, and if the misstatements had been such that an action of deceit would lie he could have recovered damages for the loss of his commission, but he could not in such an action as the present obtain any relief in respect of it. The indemnity to which he is entitled is only an indemnity against the obligations which he has contracted under the contract which is set aside, and, in my opinion, the requiring the Defendant whose misstatements, though not fraudulent, have been the cause of setting aside the contract, to indemnify the Plaintiff from those obligations, is the only way in which the Plaintiff can be restored to his old position in an action like this, but I entirely disclaim any intention of giving damages in an action of this nature.

The case of *Redgrave* v. *Hurd* (1) was relied upon by Mr.

(1) 20 Ch. D. 1.

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Haldane in support of the contention of himself and Mr. *Rigby* on this point, but in my opinion that case does not support it. What was there claimed by the defendant in his counter-claim was not merely to have the contract rescinded, and the deposit of £100 returned to him, but also to have £100 damages for his loss and trouble in removing from *Stroud* to *Birmingham*, and £200 damages for having given up his practice at *Stroud*, and for further relief. Now those two last items were simply damages. If an action had been brought for damages on intentional misrepresentation they might have been considered as coming within the proper rule as to damages—that the damages should be such as to indemnify the party against loss, but they could not be claimed in a proceeding to set aside a contract on the ground of misrepresentation not so made as to support an action for deceit.

In my opinion, therefore, the decree of the Vice-Chancellor was right in that respect as well as in the other, and the appeal must be dismissed.

BOWEN, L.J.:—

The Lord Justice *Cotton* having entered into a full examination of the evidence, I do not propose to go through it at length, but shall only state briefly the three propositions of fact which I consider to be proved. I consider it to be proved that the business of the old firm was in fact the business of *Adam & Co.*, that is to say that *Adam & Co.* were either principals or concealed partners, and although I observe that the Vice-Chancellor, because the matter was not raised distinctly before him, hesitated to say that *Adam & Co.* would be liable to creditors of the old firm, the only reason why I do not exercise the same reticence is that I do not understand how in law a person can escape liability to outside creditors if he is really the principal in the business or a partner in it. The second conclusion of fact which I do not hesitate to draw is that there was a misrepresentation as to the sufficiency of the machinery. There may have been also other misrepresentations, but there was clearly that one, which appears to me not only to have been material, but to have induced the contract. Lastly, it seems to me that the triple agreement of February, 1883, was, really, as far as the Plaintiff and *Adam & Co.* were concerned, one

agreement. The transaction really was an agreement between *Adam & Co.* and the Plaintiff that the Plaintiff should enter into the contract of partnership with *Townend* (which occupies the first of the three documents, all of which constitute the arrangement of February, 1883), and should take upon himself the partnership with *Townend* for a period of five years, and should place his credit at the disposal of the new firm. Now whether or no after that agreement *Adam & Co.* still remained partners in the new firm as they had unquestionably been partners or principals in the old, I say nothing. It is not necessary, in my opinion, for us to decide that question, and, so far as I am concerned, I leave it unsolved.

Now, if the propositions of fact which I have mentioned are established, equity will set aside this contract, and the only question remaining is, upon what terms, and what is the extent and nature of the relief which ought to be given to the Plaintiff. The Vice-Chancellor has in the first place ordered repayment of the sum of £9700 brought by the Plaintiff into the partnership, and also of the sum of £324, which, although not brought in *eo nomine* into the partnership, was in substance brought into it, because it was applied by the Plaintiff in discharge of debts of the firm. He has ordered these sums to be repaid after deducting certain moneys received by the Plaintiff, the balance being £9279 6*s.*, and he has further declared that the Defendants Messrs. *Adam*, as well as Mr. *Townend*, are bound to indemnify the Plaintiff against all outstanding debts, claims, demands, and liabilities which the Plaintiff has become or may become subject to, or be liable to pay, for or on account of or in respect of the dealings and transactions of the partnership. I dwell at some length on this part of the case, because I conceive it to be important that we should lay down exactly the line on which our judgment proceeds, and decide nothing more than is necessary for the decision of the case, leaving open any points which it is not necessary to decide.

Now, in the first place, in considering the question to what extent Mr. *Newbigging* is entitled to demand an indemnity from *Adam & Co.*, one must consider the doctrine of equity as to the relief which will be given in cases of fraud and misrepresentation.

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A contract obtained by fraud, being voidable and not void, remains until it is set aside, and when it is set aside it is treated both at law and in equity as non-existing. It appears that equity, as has been pointed out in the case of *Peek* v. *Gurney* (1), has a concurrent jurisdiction with law to give relief in cases of fraud. Common law recognised a rescission if the case shaped itself so that a Court of Common Law had jurisdiction to decide whether there should be a rescission or not, but, besides this, the common law gave damages for deceit, and in my opinion gave them, not as an alternative remedy, but as an alternative or cumulative remedy as the case might be. The Court of Chancery had a concurrent jurisdiction, and in cases of fraud, so far as I know, there can be no doubt that complete indemnity could be given by a Court of Equity to the person who had been defrauded, so as to protect him as fully in equity as he could have been protected in law.

If we turn to the question of misrepresentation, damages cannot be obtained at law for misrepresentation which is not fraudulent, and you cannot, as it seems to me, give in equity any indemnity which corresponds with damages. If the mass of authority there is upon the subject were gone through I think it would be found that there is not so much difference as is generally supposed between the view taken at common law and the view taken in equity as to misrepresentation. At common law it has always been considered that misrepresentations which strike at the root of the contract are sufficient to avoid the contract on the ground explained in *Kennedy* v. *Panama, New Zealand, and Australian Royal Mail Company* (2); but when you come to consider what is the exact relief to which a person is entitled in a case of misrepresentation it seems to me to be this, and nothing more, that he is entitled to have the contract rescinded, and is entitled accordingly to all the incidents and consequences of such rescission. It is said that the injured party is entitled to be replaced in *statu quo*. It seems to me that when you are dealing with innocent misrepresentation you must understand that proposition that he is to be replaced *in statu quo* with this limitation—that he is not to be replaced in exactly the same position in all

(1) Law Rep. 13 Eq. 79; 6 H. L. 377. (2) Law Rep. 2 Q. B. 580.

respects, otherwise he would be entitled to recover damages, but is to be replaced in his position so far as regards the rights and obligations which have been created by the contract into which he has been induced to enter. That seems to me to be the true doctrine, and I think it is put in the neatest way in *Redgrave* v. *Hurd* (1). In that case there was a misrepresentation, but, though there was a suggestion of fraud in the pleadings, the Court of Appeal thought that fraud was not so expressly pleaded as to enable the Court to treat the case as one of fraud, and that the relief given must depend on misrepresentation alone. The Master of the Rolls, so treating it, says (2): "Before going into the details of the case I wish to say something about my view of the law applicable to it, because in the text-books, and even in some observations of noble Lords in the House of Lords, there are remarks which I think, according to the course of modern decisions, are not well founded, and do not accurately state the law. 'As regards the rescission of a contract, there was no doubt a difference between the rules of Courts of Equity and the rules of Courts of Common Law—a difference which of course has now disappeared by the operation of the *Judicature Act*, which makes the rules of equity prevail. According to the decisions of Courts of Equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was, 'A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it.' The other way of putting it was this, 'Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency: no man ought to seek to take advantage of his own false statements.' The rule in equity was settled, and it does not matter on which of the two

(1) 20 Ch. D. 1. (2) 20 Ch. D. 12.

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grounds it was rested. As regards the rule of common law there is no doubt it was not quite so wide. There were, indeed, cases in which, even at common law, a contract could be rescinded for misrepresentation, although it could not be shewn that the person making it knew the representation to be false. They are variously stated, but I think, according to the later decisions, the statement must have been made recklessly, and without care whether it was true or false, and not with the belief that it was true." With great respect for the shadow and memory of that great name I cannot help saying that this is not a perfect exposition of what the common law was, but, so far as the rule of equity goes, I must assume that the Master of the Rolls spoke with full knowledge of the equity authorities, and he treats the relief as being the giving back by the party who made the misrepresentation of the advantages he obtained by the contract. Now those advantages may be of two kinds. He may get an advantage in the shape of an actual benefit, as when he receives money; he may also get an advantage if the party with whom he contracts assumes some burthen in consideration of the contract. In such a case it seems to me that complete rescission would not be effected unless the misrepresenting party not only hands back the benefits which he has himself received—but also re-assumes the burthen which under the contract the injured person has taken upon himself. Speaking only for myself I should not like to lay down the proposition that a person is to be restored to the position which he held before the misrepresentation was made, nor that the person injured must be indemnified against loss which arises out of the contract, unless you place upon the words "out of the contract" the limited and special meaning which I have endeavoured to shadow forth. Loss arising out of the contract is a term which would be too wide. It would embrace damages at common law, because damages at common law are only given upon the supposition that they are damages which would naturally and reasonably follow from the injury done. I think *Redgrave* v. *Hurd* (1) shews that it would be too wide, because in that case the Court excluded from the relief which was given the damages which had been sustained by the plaintiff in removing his business,

(1) 20 Ch. D. 1.

and other similar items. There ought, as it appears to me, to be a giving back and a taking back on both sides, including the giving back and taking back of the obligations which the contract has created, as well as the giving back and the taking back of the advantages. There is nothing in the case of *Rawlins* v. *Wickham* (1) which carries the doctrine beyond that. In that case, one of three partners having retired, the remaining partners introduced the plaintiff into the firm, and he, under his contract with them, took upon himself to share with them the liabilities which otherwise they would have borne in their entirety. That was a burthen which he took under the contract and in virtue of the contract. It seems to me, therefore, that upon this principle indemnity was rightly decreed as regards the liabilities of the new firm. I have not found any case which carries the doctrine further, and it is not necessary to carry it further in order to support the order now appealed from. A part of the contract between the Plaintiff and *Adam & Co.* was that the Plaintiff should become and continue for five years partner in a new firm and bring in £10,000. By this very contract he was to pledge his credit with his partners in the new firm for the business transactions of the new firm. It was a burthen or liability imposed on him by the very contract. It seems to me that the £9000 odd, and, indeed, all the moneys brought in by him or expended by him for the new firm up to the £10,000, were part of the actual moneys which he undertook by the true contract with *Adam & Co.* to pay. Of course he ought to be indemnified as regards that. I think, also, applying the same doctrine, he ought to be indemnified against all the liabilities of the firm, because they were liabilities which under the contract he was bound to take upon himself. It seems to me upon those grounds that the decision of the Vice-Chancellor ought to be supported.

FRY, L.J. :—

I entirely agree in the conclusion at which my learned Brothers have arrived, and I shall add but very few words to what they have said, because their exposition of the facts of this case and of the law applicable to it has been so full. [His Lordship then

(1) 3 De G. & J. 304.

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made some further observations on questions of fact in the case, and proceeded:—]

The only other point upon which I will say anything is with regard to the indemnity, and in this case it is obvious that my learned Brothers, although arriving at the same conclusion, have arrived at that conclusion by different roads. It is perhaps enough to say that I agree in their conclusion, and so escape from an inquiry of a very nice and subtle kind. I will only say this, that the inclination of my opinion is towards the view of Lord Justice *Cotton;* that I am inclined to hold that the Plaintiff is entitled to an indemnity in respect of all obligations entered into under the contract when those obligations are within the necessary or reasonable expectation of both of the contracting parties at the time of the contract. I hesitate to adopt the view of Lord Justice *Bowen,* that the obligations must be created by the contract, and I feel a little doubt whether the obligation in question in the present suit can be said to have been so created.

It appears to me, however, to be plain that the Plaintiff having been induced by the Defendants to enter into the contract of partnership, it must have been in the contemplation of the contracting parties that the new partner would under that new contract of partnership become liable to the ordinary partnership obligations, and the obligations against which indemnity is sought are such ordinary partnership obligations. I think, therefore, that the Vice-Chancellor was well founded in the decree that he pronounced, and that this appeal must be dismissed with the usual consequences.

Solicitors for Appellants: *Parker, Garrett & Parker.*

Solicitors for Plaintiff: *Flower & Nussey,* agents for *Killick Hutton & Vint, Bradford.*

H. C. J.

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1887
Jan. 15, 17.

In re EVANS.
EVANS *v.* EVANS.

[1886. E. 121.]

Personal Representative of Trader — Carrying on Trade of Deceased — Goods bought by Representative for Purposes of the Trade—Rights of the Vendors.

The administratrix of an intestate, a dealer in builders' materials, carried on the intestate's trade, and bought cement for the purposes of the trade. On the 15th of April, 1886, a receiver and manager was appointed in an administration action by the infant child of the intestate. On the 22nd of April the vendors recovered judgment against the administratrix for the price of the cement, but judgment was not signed till the 18th of May, on which day, the cement remaining in specie was sold along with other effects under an order in the administration action. Execution was never issued by the vendors of the cement, but they applied in the administration action to have the proceeds of its sale applied in payment of their debt. *Kay*, J., refused this relief, but declared them entitled to a lien on the beneficial interest of the administratrix in the intestate's estate. The vendors appealed:—

Held, that the cement, as between the vendors and the administratrix, was the property of the administratrix, she being a debtor to them for the price, and that as between the administratrix and the estate the cement belonged to the estate subject to the right of the administratrix to be indemnified for the price if she was not a debtor to the estate—that the vendors could not have any higher claim than hers, and were not entitled to anything more than the order gave them.

Whether the order was right in declaring them entitled to a lien, *quære*.

ISAAC EVANS, who carried on business at *Cardiff* as a builders' material merchant, died intestate on the 26th of February, 1884. His estate was stated to consist of stock-in-trade and book debts valued together at £1186 18*s*. He was also entitled to a share of the personal estate of his father, in respect of which at the time of this appeal nothing had been received.

The widow of *Isaac Evans* took out administration to his estate on the 1st of May, 1884. She proceeded to carry on her husband's business, and did so till the 15th of April, 1886, on which day *W. C. Clarke* was appointed in this action receiver and manager of the intestate's business at the suit of the intestate's infant son, and was authorized to act at once before giving security, Inquiries were directed (1) Of what the personal estate of the said

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intestate consists? (2) An inquiry whether any debt of the said intestate now remains unpaid?

On the 22nd of April, 1886, judgment was obtained by the *Garston and Medway Portland Cement Company* against Mrs. *Evans* for £135 11*s.* 7*d.* for cement supplied to her for the purposes of the business, but judgment was not signed till the 18th of May. On the 19th of May another judgment at their suit was signed against Mrs. *Evans* for £55 10*s.* 3*d.* on a like account. In each case Mrs. *Evans* had accepted bills of exchange for the price of the goods.

In the meantime, on the 4th of May, 1886, an order was made at Chambers in the administration action giving the receiver and manager leave to sell the stock and plant, and on the 18th of May they were accordingly sold. About half of the cement supplied by the company remained in specie, and was included in this sale. Before the sale the company gave the receiver notice that they should claim the proceeds of the cement included in the sale.

On the 26th of May the company served notice of motion that notwithstanding the appointment of the receiver and manager they might be at liberty to issue execution against the goods of the Defendant in the business premises, and that an inquiry might be directed whether any and what part of the property and effects then in the hands of the receiver and manager belonged to or had been received by, or in the case of book debts had become owing to the Defendant since the death of the intestate, and that the receiver and manager might be directed to apply the proceeds of such property and effects and such book debts when collected in payment of the company's debt in preference to any claims of creditors of the intestate.

On the 8th of July, 1886, Mr. Justice *Kay* made an order declaring that the company were entitled to a lien upon the beneficial interest of the Defendant in the intestate's estate for the amount of their judgment and for their costs of the application, and the applicants were to be at liberty to apply in this action to raise the same.

The company appealed, and the appeal was heard on the 15th and 17th of January, 1887.

Everitt, Q.C., and *Grosvenor Woods*, for the appeal:—

The receiver sells the cement on the very day on which we sign judgment. The Court will not allow the estate to be increased by the receiver sweeping in property remaining in specie and not paid for.

[LINDLEY, L.J.:—The cement did not belong to you but to the widow.]

That is what we contend, and we say that we are entitled to treat it as hers.

[COTTON, L.J.:—You have issued no *fi. fa.*, and had no right to the goods at the time of the sale.]

A *fi. fa.* would have been useless when the goods had been sold. The Court having the money in its hands will give it to the rightful owner: *Ex parte Simmonds* (1).

[LINDLEY, L.J.:—The Court having got the money will give it to the rightful owner, but you are not the rightful owner unless the goods were yours when sold, and how do you make out that they were?]

The Court will not allow the persons claiming the intestate's estate to take the benefit of goods which were not his, and are unpaid for, without paying for them: *In re Johnson* (2). The order appointing a receiver did not apply to these goods, for they were not part of the intestate's estate in any way—there being no authority to carry on the business—we ought not therefore to be prejudiced by the appointment of a receiver nor by the other proceedings in the action.

Pearson, Q.C., and *Mulligan*, *contrà*:—

The case is governed by *Kitchen* v. *Ibbetson* (3), *In re Morgan* (4), and *Strickland* v. *Symons* (5), which last is almost on all fours with the present case. The widow made this property part of the assets of the business, subject to any lien she may have if the estate is indebted to her, and if the estate is not indebted to her it is part of the testator's assets to all intents and purposes.

(1) 16 Q. B. D. 308.
(2) 15 Ch. D. 548.
(3) Law Rep. 17 Eq. 46.
(4) 18 Ch. D. 93.
(5) 22 Ch. D. 666; 26 Ch. D. 245.

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In no case can the vendors have any direct claim against the cement or its proceeds.

G. T. J. Millar, for the administratrix.

Everitt, in reply :—

Here there is no accretion to the trust estate, for the goods were existing in specie and had not been paid for. The case, therefore, is not within the authorities referred to against us. Our position is that goods purchased without authority and not paid for are not to be treated as part of the trust estate.

[COTTON, L.J. :—Can you claim against the goods, and at the same time claim against the beneficial interest of the widow?]

I contend that the two claims are not inconsistent. We ask for an inquiry which shall do justice between us and the other parties interested.

COTTON, L.J. :—

This is an appeal from a decision of Mr. Justice *Kay*, who made an order not giving the Appellants so much as they want, an order involving considerable difficulty. A trader dies and his personal representative carries on his business. Whether the representative carries it on with or without authority, a person with whom he contracts a debt has no remedy against the assets, though an executor, if he has carried on the business in accordance with his duty, has a right to be indemnified out of them. Here the widow of an intestate took out letters of administration and continued his business, thinking it to be for the benefit of herself and her child. She incurred debts for the purpose of the business, and the persons who supplied her with goods claim first against her and then against the goods. They brought an action against her for the goods supplied to her. A relation of the infant child then brought an action as his next friend for administration of the intestate's estate, as he saw that there would be executions under which the intestate's assets would be in danger of being seized. On the 22nd of April, 1886, an order was made in the creditors' action, but judgment was not signed till the 18th of May. On that same day the goods were sold along with other

property belonging to the business under an order in the administration suit. The creditors did not take out any execution, nor have they yet done so. They excuse themselves for this by saying that executions would have been of no use, the receiver being in possession. But that is not so, for a writ of execution in the sheriff's hands would have given them a specific claim against these goods. The case might be disposed of on that ground alone—that the Appellants not having taken out execution had no specific claim against these goods, though I must not be understood as saying that if they had taken out execution they would have been entitled to seize them.

Mr. Justice *Kay* has by his order given the Appellants a right to be paid out of the beneficial interest of the widow in the intestate's estate. The Appellants say that this relief is less than what they are entitled to, and I have thought it right to consider how far in a case like the present provision ought to be made for payment of debts of the administratrix out of property in the hands of the receiver, part of which is the property of the administratrix. The creditor cannot have any direct claim against the intestate's estate. He cannot have anything higher than a right to be substituted to the right of the administratrix to indemnity. Where a business is carried on by a trustee with proper authority, and he buys for the business goods for the price of which he is personally liable, the *cestuis que trust* cannot say to the trustee: "These goods belong to us and we will take them without regard to your right to indemnity." But have the creditors any claim against the goods on that ground? The goods now in question were acquired for the purposes of the business, and went into the business. The infant child of the intestate claims them as belonging to the estate, and in my opinion he has a right so to claim them, subject to the right of the widow to be indemnified out of them against all claims in respect of them so far as she has not lost such right by being a debtor to the estate, and whether she has lost that right is a question depending on the result of the general account. The Appellants therefore have no claim to be paid as they ask out of the proceeds of these goods. Whether if the widow had appealed against Mr. Justice *Kay's* order it could have been supported I give no opinion. She does not

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appeal or object, and it is only necessary to say that in my opinion the order gives the Appellants as much as they are entitled to. There should be added to the order a direction for an account of the receipts and payments of the administratrix, but the Appellants had better consider whether it is desirable for them to proceed further, since if the widow is found indebted to the estate to such an extent that nothing is coming to her they cannot recover anything.

LINDLEY, L.J.:—

This appeal is, in my opinion, grounded on an erroneous theory. Whether the order does not give the Appellants too much is a question we have not to consider since it is not raised, but I am satisfied that it gives them as much as they are entitled to. The intestate died in February, 1884, leaving a widow and child. He was a sole trader. The widow took out letters of administration and continued his business. In the course of carrying it on she bought a quantity of cement from the Appellants. As between the Appellants and her she became the owner of the cement, there being no question of vendor's lien. The cement was her property and she was their debtor for the price. They obtained judgment against her for the price, and it was signed on the 18th of May, 1886, though the order had been made on the 22nd of April, a delay which is not accounted for. If the Appellants had obtained judgment earlier and taken out execution they could have seized any goods of hers. But they never issued a *fi. fa.*, and therefore never had any right to seize the goods, supposing them to be the goods of the widow. They had as her judgment creditors no more right against the goods in equity than at law, though they might obtain a right to stand in her shoes and be paid out of what was coming to her from the estate. Mr. *Everitt* raises the case that the Appellants have an equitable claim to the proceeds of sale of these goods, but how does he make it out? He says that the cement was the property of the administratrix as between her and the estate. Suppose it was, how does that give the Appellants any title to it? Having regard to the cases cited, the Appellants cannot stand in any higher position against the estate than their debtor does, and

these goods must, I think, subject to the right of the widow to indemnity, be considered part of the estate. The order appealed from gives them the full benefit of the claim of the administratrix against the estate, and they cannot possibly be entitled to anything more.

LOPES, L.J.:—

It is clear that the judgment creditors could have no remedy against these goods at law, and I venture to think that they could have none in equity. I think that if the widow had appealed against the order of Mr. Justice *Kay* there might have been some difficulty in maintaining it.

Solicitors for Appellants: *F. Venn & Co.*, agents for *H. W. Collins, Robinson & Co., Liverpool.*

Solicitors for Respondents: *Smiles, Binyon, & Ollard.*

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In re PRICE (A PERSON OF UNSOUND MIND).

Criminal Lunatic—Application of Property for his Benefit—Lunacy Regulation Act, 1862 (25 & 26 *Vict. c.* 86), *ss.* 12, 13 [*Revised Ed. Statutes, vol. xiv. p.* 191]—*Criminal Lunatics Act*, 1884 (47 & 48 *Vict. c.* 64), *s.* 10, *sub-s.* 3.

The power given by the *Lunacy Regulation Act*, 1862, s. 12, of making orders for the purpose of rendering the small property of a lunatic available for his maintenance or benefit, is to be exercised only for his benefit, and not for the purpose of enabling his creditors to obtain payment.

A person of small means was confined as a criminal lunatic in *Broadmoor Asylum*, and there appeared no reasonable prospect of his ever being released. His mother and brother applied for an order that his property, along with some property in which they were interested together with him, might be applied in payment of moneys for which the lunatic had given security, the mother undertaking to pay his other debts:—

Held, that the application must be refused as not being for his benefit.

ALFRED JAMES PRICE, aged thirty, was admitted into *Broadmoor Criminal Lunatic Asylum* on the 12th of May, 1885. The medical evidence shewed that he was of unsound mind when admitted, and had continued so without any improvement. He

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had for many years been subject to epileptic fits, and in the early part of 1885 became of unsound mind and subject to homicidal mania. He had for many years been engaged in no occupation. He was entitled to a moiety of the reversion in eighteen shares in the *National Provincial Bank of England*, expectant on the decease of his mother, a widow, aged fifty-seven, the other moiety belonging to his only brother. The value of the lunatic's interest was stated by affidavit to be not more than £436 10*s*. He was also absolute owner of three shares in the same bank worth £150. The above was his whole property. He had charged his interests to an amount far exceeding their value for sums advanced to him by the *National Provincial Bank* and another bank, and he was indebted to other persons.

Under these circumstances the mother and the only brother of *A. J. Price* presented a petition under the *Criminal Lunatics Act*, 1884, the *Lunacy Regulation Act*, 1862, and the *Amended Lunacy Regulation Act*, 1882, asking that the bank shares and interest of *A. J. Price* might be vested in the Petitioners, who might receive the income thereof and sell the said shares, and out of the proceeds thereof, so far as the same would go, pay what was due from *A. J. Price* to the banks, and the mother offered out of her own monies to discharge his other debts and liabilities.

The petition was laid before Lord Justice *Fry*, who was of opinion that the application was not for the benefit of the lunatic, and refused to make an order, but gave leave to adjourn the case into Court.

Methold, for the petition :—

If the order is made the Petitioners are willing to surrender their interests in the eighteen shares, and apply the proceeds, along with those of the three shares, in payment of the banks, and the mother will undertake to pay the other debts of the lunatic and to make provision for him by her will in the event of his being discharged from the asylum. The result will be that if he comes out of the asylum he will start life again discharged from his liabilities, and such an arrangement is for his benefit: *Lowther* v. *Bentinck* (1).

(1) Law Rep. 19 Eq. 166.

COTTON, L.J.:—

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This is an application for an order under the *Criminal Lunatics Act*, 1884, and the *Lunacy Regulation Act*, 1862, with respect to a small property of the lunatic. By those Acts the Court having jurisdiction in Lunacy is enabled, where satisfied that the person is of unsound mind, and that his property is under £1000, without directing any inquiry under a commission of lunacy, to make an order "for the purpose of rendering the property of such person, or the income thereof, available for his maintenance or benefit, or for carrying on his trade or business." The question here is whether the proposed application of the property is for the lunatic's benefit, his maintenance being out of the question. The object of the application is to enable the property to be applied in payment of the lunatic's debts, his mother contributing for the purpose. He is a prisoner in *Broadmoor Lunatic Asylum*, and can we say that the proposed application of the property is for his benefit? He clearly would get no benefit from it while in the asylum, but it is urged that the fact that if released he would come out free from debt, makes the proposed application beneficial to him. But the mere suggestion of a possible benefit is not a benefit. A man cannot now be put in prison for debt, so that freedom from debt is not so important as it once was. There is nothing to bind the mother to make further provision for the lunatic, and we do not know what his circumstances may be if and when he is discharged, an event which appears highly improbable. If there were a reasonable probability that he would recover and come out of the asylum the case would be open to different considerations.

We were referred to *Lowther* v. *Bentinck* (1), but, in my opinion, it has no bearing on the case. The question there was whether under a power to apply money for the preferment or advancement of a child, "or otherwise for his benefit," money could be applied in payment of his debts. That was clearly for his benefit, and the only question was whether it was such a benefit as was contemplated by the power. Here the difficulty is to make out that the proposed application is for the lunatic's benefit at all. We are all of opinion that orders ought to be made under these

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provisions only where they will benefit the lunatic, and not for the purpose of benefiting his creditors.

LINDLEY, L.J.:—

The section in the Act of 1884 refers to the 12th and 13th sections of the Act of 1862, which give power to make orders for the purpose of making the lunatic's property and income available for his maintenance or benefit or for carrying on his trade or business. The proposed application of his property is not for his maintenance or for carrying on his trade. Is it for his benefit? It appears to me that it is not, as I do not see what he would get by it.

LOPES, L.J.:—

We cannot make an order under these Acts unless the property is to be applied for the maintenance of the lunatic or for his benefit or for carrying on his trade. The case manifestly does not come under the first or third head; is the application, then, for the lunatic's benefit? On the evidence there appears no prospect of his ever coming out of the asylum, or of any other property coming to him, so the only persons who will be benefited are the creditors. The application must therefore be refused.

Solicitors: *J. & C. Robinson & Wilkins*, agents for *Minett & Piddocke, Ross, Herefordshire.*

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[1879 H. 457.]

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1886
KAY, J.
Nov. 26;
Dec. 4.
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Taxation—Bill of Costs—Solicitor and Client—Election—Notice—"Undertaking any business"—"Client"—Mortgagee—Subsequent Incumbrancer—Mortgagor—General Order under Solicitors' Remuneration Act, 1881, *rr.* 6, 8.

The notice of election under rule 6 of the General Order to the *Solicitors' Remuneration Act*, 1881, must be given by the solicitor before he undertakes any business at all in the particular matter for his client. After having done any work in the matter for which he could charge his client if the scale under the Order did not apply, it is too late for him to elect.

In re Allen (1) followed.

Per KAY, J.:—Where notice of election under the rule has been properly given by a solicitor to his client, a first mortgagee, it is binding on a subsequent incumbrancer and also on the mortgagor.

A solicitor who acted for a mortgagee in relation to the mortgaged property received from the solicitors of the persons entitled to the equity of redemption a request that the mortgagee would sell under his power of sale, and in pursuance of this he, without any express authority from his client, did work in relation to the contract for sale for which if authorized he would, apart from the rules, under the *Solicitors' Remuneration Act*, have been entitled to be paid, and which would be covered by the scale fee. The sale was completed:—

Held (affirming the decision of *Kay*, J.), that a notice of election to be remunerated according to the old system, which was given by the solicitor after work of the above description had been done, was too late, although given before the contract was signed, for that as the client had ratified his proceedings he stood in the same position as if he had received previous authority, and must be treated as having undertaken the business as soon as he did any work of the above description.

The Taxing Master having taxed according to the scale, an objection was taken, solely grounded on the notice to elect:—

Held, that the Court could not enter upon the question whether there had been an agreement between the mortgagee and his solicitor that the latter should be remunerated according to the old system.

Whether, if the right to elect was gone, any such agreement would bind the parties entitled to the equity of redemption, *quære*.

SUMMONS to review taxation.

The action was by Mrs. *Hester* and her children, some of whom were infants, for the administration of the trusts of her marriage settlement. Part of the settled property consisted of the equity of redemption in a leasehold house, at 7, *Worthington Terrace*,

(1) *Ante*, p. 433.

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Forest Hill, Kent, which was subject to a first mortgage to Messrs. *Kibble, Neighbour & Dudley*, on which about £525 was due for principal, and to a second mortgage to one *Becker*. None of the mortgagees were parties to the action. It was desired to sell this house, and on the 21st January, 1884, Mr. *Sidney Chapman*, the Plaintiffs' solicitor, wrote to Messrs. *R. Smith & Wilmer*, who had for some time acted as solicitors to the first mortgagees in relation to this property, stating that there was difficulty in preparing a contract of sale, as the trustees of the settlement had been discharged and no new ones appointed, and proposing an arrangement that the first mortgagees should sell under their power with the sanction of the Court to be embodied in an order. On the 20th of June, 1884, an order was made, on the application of the Plaintiffs, and on hearing solicitors for the incumbrancers, authorizing the first mortgagees to sell the property under their power of sale to one *Scott* for £800, and directing them to retain out of the proceeds the amount of their mortgage debt, with interest from a given day, and an agreed sum for costs up to the 19th of December, 1883, and also their subsequent costs as mortgagees, such subsequent costs to be taxed by the Taxing Master, and £6 8*s*. for their costs of that application, and then to pay to the second mortgagee his debt and taxed costs and £5 4*s*. for his costs of the application, and to pay the balance, if any, of the purchase-money into Court.

A contract was then prepared and sent to the Plaintiffs' solicitor at his request, but, *Scott*, the proposed purchaser, refused to proceed with his purchase; and after considerable negotiation a contract dated the 27th of June, 1885, was concluded for the sale to him at the price of £775, an order having been obtained by the Plaintiffs' solicitor on the 5th of December, 1884, modifying the order of the 20th of June, by authorizing the first mortgagees to sell at that price instead of £800. On the 4th of June, 1885, prior to the contract being entered into, Messrs. *Smith & Wilmer* wrote the following letter to the Plaintiffs' solicitor:—

"26, *Lincoln's Inn Fields*,
"4th June, 1885.

"Dear Sir, "7, *Worthington Terrace*.

"Messrs. *Lewis & Son* have now returned draft contract for sale

of the leasehold interest in these premises to Mr. *Scott* for £775 approved, subject to certain alterations which they have made therein, the principal one being that they have struck out a clause which we inserted that, although the abstract should commence with the lease of 6th August, 1862, the vendors should not be bound, except at the purchaser's expense, to supply any abstract of title between such lease and the assignment to Mr. *Hester*. This we did because we find that the abstract with the title deeds, and which was delivered on Mr. *Hester's* mortgage, occupies fifty-seven brief sheets, and if to this is added, say, three sheets for the abstract of the mortgage and the transfer to the present trustees, the mere copying would come roughly to £10, leaving, if the charges are made according to the scale, only £2 to cover the costs of the present sale. It is clear that we cannot undertake to act as vendor's solicitors upon these terms; and, as under the 6th of the General Rules (in pursuance of the *Solicitors' Remuneration Act*, 1881), we are at liberty to elect that our remuneration shall be according to the system existing at the date of such Orders as altered by Schedule II. upon notice communicated to our client before undertaking the business, we wish to inquire whether, as representing the persons entitled to the equity of redemption, you will agree to our costs as vendors' solicitors being paid as if we had given such notice. In any case we must of course make proper charges for the abortive contract but this is a separate matter.

"Yours truly,

"*R. Smith & Wilmer.*"

On the 11th of June, 1885, the Plaintiffs' solicitor replied that, as representing the parties entitled to the equity of redemption, he did not see anything objectionable in Messrs. *Smith & Wilmer's* election to charge on the old scale as altered by Schedule II., and that he would ascertain whether the second mortgagee entertained any objection. On the following day he wrote to Messrs. *Smith & Wilmer* to the effect that the second mortgagee appeared to have no objection.

The following letter was then written from *Smith & Wilmer's* firm to *Kibble*, on behalf of himself and the other first mortgagees:—

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"26, *Lincoln's Inn Fields*,
"13th June, 1885.

"My dear Sir, "7, *Worthington Terrace.*

"I am glad to tell you that the solicitors of Mr. *Scott*, the proposed purchaser of these premises, are now instructed that he will give £775 for them, and enclosed I send you for signature, as one of the vendors, the form of agreement which has been prepared and which please sign and return to me that I may obtain the signatures of your co-trustees. As the abstract of title in this case is rather long, owing to the numerous dealings that have taken place with reference to the property, I have communicated with Mr. *Sidney Chapman*, as the solicitor entitled to the equity of redemption, as to what would be the proper arrangement as to costs: and in accordance with the General Orders made in pursuance of the *Solicitors' Remuneration Act*, 1881, I may mention that my firm elects that our remuneration should be according to the system existing previously to the Act as altered by Schedule II. annexed to the said orders. As the purchase-money is amply sufficient to pay the principal and interest due to the first mortgagees, as well as the costs, I should not refer to the latter, but the provisions to the Act above referred to seem to render it necessary that I should do so in order to prevent any question being hereafter raised by the second mortgagee.

"Yours very truly,
"*Richard Smith.*"

It appeared that until the writing of this letter Messrs. *Smith & Wilmer* had had no communication with their clients as to this sale.

The bill carried in by Messrs. *Smith & Wilmer*, the solicitors to the first mortgagees, for taxation under the order of the 20th of June, 1884, was made out according to the system existing at the date of the General Order under the *Solicitors' Remuneration Act*, 1881, as altered by Schedule II. to the Order. The Taxing Master however refused to tax the bill, except upon the scale in Schedule I., Part 1, to the Order. According to this scale the charge allowed to the "vendor's solicitor for deducing title to

freehold, copyhold, or leasehold property, and perusing, and completing conveyance (including preparation of contract, or conditions of sale, if any)" is 30*s.* per £100 up to £1000; so that the charge in the present instance, upon that scale, was £12: but it appeared that the cost of the abstract alone as delivered by the vendors, the first mortgagees, amounted to £12 10*s.*, their solicitors being thus 10*s.* out of pocket.

The first mortgagees objected to their solicitors (whose costs were by the order of the 20th of June, 1884, to be added to the mortgage debt) being allowed a remuneration upon that scale only, alleging, as the ground for their objection, that their solicitors, "before undertaking the business, by writing under their hands communicated to them, elected that their remuneration should be according to the system in use at the date of the said General Order as altered by Schedule II. thereto."

The following were the Taxing Master's answers to the objection:—"It does not appear that Messrs. *Smith & Wilmer* gave to their clients the notice in manner prescribed by the 6th clause of the preliminary part of the General Order made in pursuance of the *Solicitors' Remuneration Act*, 1881. They gave such notice to Mr. *Chapman*, the solicitor for the mortgagor, an infant. There may be a surplus coming to this infant. The second mortgagee may also raise an objection. And if the notice had been given as prescribed by the 6th clause, I think that it would not operate against anyone but the client. The client, on receiving such notice, can refuse to let the solicitor proceed: a third party has no such option."

The Taxing Master then certified the taxation according to the scale in the General Order, whereupon the first mortgagees took out this summons, asking that their objections to the taxation might be allowed, and for a reference back to the Taxing Master to vary his certificate accordingly.

It appeared that the second mortgagee, who had been served with the summons, had been paid, and that the Plaintiffs, who had also been served, had declined, through their solicitor, Mr. *Chapman*, to oppose the application.

The summons was heard before Mr. Justice *Kay* on the 26th of November, 1886.

C. A. 1887 HESTER v. HESTER.

Ingle Joyce, for the summons:—

The Taxing Master insisted that to be effective the notice under rule 6 should have been given to all the parties interested in the property, and not merely to Messrs. *Smith & Wilmer's* own clients, the first mortgagees. I submit that he was wrong. Taxation is as between the solicitor and his client. The question is, who is the "client" within the meaning of rule 6? By rule 8 the word "client" is to have the meaning ascribed to it in the 3rd sub-section of sect. 1 of the *Solicitors' Remuneration Act*, 1881, but that sub-section does not apply to this case, for it does not include the owner of the equity of redemption. I say the "clients" here were the first mortgagees, as being the "persons liable to pay to the solicitor;" and therefore Messrs. *Smith & Wilmer* were right in giving notice to the first mortgagees alone. It is true that under the third-party clause, sect. 38, of the *Attorneys and Solicitors Act*, 6 & 7 Vict. c. 73, a mortgagor may obtain taxation of a bill paid by his mortgagee, because that section entitles any person, not being "the party chargeable" with the bill, but liable to pay, to have the bill taxed, though, even then, the taxation is as between the solicitor and his client, the mortgagee: *In re Wells* (1). Under the *Solicitors' Remuneration Act*, 1881, the party chargeable with the bill, and no one else, is the "client."

[KAY, J.:—Before giving judgment I will speak to the Taxing Master on the point.]

1886. Dec. 4. KAY, J.:—

This case came on upon a summons to review taxation. The question raised is the same as that in a case I had before me a few days ago, *In re Allen* (2), upon the construction and meaning of rule 6 of the General Order under the *Solicitors' Remuneration Act*, 1881. The question seems to be whether proper notice of election was given by the solicitors to their clients, the mortgagees, before they undertook the business. Having some doubt as to what the exact ground of the Taxing Master's decision was, I said I would communicate with him, and he has been good

(1) 8 Beav. 416. (2) *Ante*, p. 433.

enough to explain to me what the ground was. The answer he is stated to have given to the objection to the taxation was that the solicitors, Messrs. *Smith & Wilmer*, did not give their clients notice in accordance with the 6th clause of the preliminary part of the General Order.

He now informs me that the ground was that the notice was not given in time.

The facts of the case are these. [His Lordship stated them, and after reading *Smith & Wilmer's* letter of the 13th of June, 1885, continued :—] The Taxing Master's view is that this notice of election was too late, and in that view I entirely concur. As I stated in *In re Allen* (1), the meaning of rule 6 is, that before undertaking the business the solicitor must make his election. He is not to begin the business and then, when he comes to a certain point, say he elects. That would be contrary to the meaning of the rule. The solicitor must elect in the first instance before he undertakes the business at all. Here the solicitors had most certainly undertaken the business before they wrote the letter of the 13th of June, as in fact appears from the terms of it. As I stated in the former case, after a solicitor has accepted employment from his client, and has done any work in it for which he could charge him if the scale under the order did not apply, it is too late for him to elect. Here the solicitors had done for their clients, in this very transaction, business for which they could have charged their clients under the old practice: therefore, in my opinion, it was too late for them to elect.

There is another matter, which it is not absolutely necessary for me to consider for the purpose of my decision, but upon which I should state my opinion, because it is of importance.

The Taxing Master seems to have considered that even if the notice of election had been properly given, it would not have been binding upon the second mortgagee. With that opinion I do not agree. Election is a matter entirely between the client —here the clients are the first mortgagees—and his solicitor. An election only puts the solicitor in the position in which he was before the scale was adopted; and there appears to me to be no hardship in saying that if the election is properly made as between

(1) *Ante*, p. 433.

C. A. 1887 HESTER v. HESTER. Kay, J.

the solicitor and his own client, a first mortgagee, it would be binding as between the solicitor and a subsequent mortgagee. In my opinion it would be binding both as against the mortgagor and the second mortgagee.

My opinion is that the election made by the letter of the 13th of June was too late: consequently the decision of the Taxing Master is right, and the summons must be dismissed with costs.

G. I. F. C.

C. A.

Smith & Wilmer appealed, and the appeal was heard on the 19th of January, 1887. No one appeared to oppose it.

Ingle Joyce, for the appeal:—

The decision of Mr. Justice *Kay* in *In re Allen* (1) having been affirmed by the Court of Appeal, it is necessary for me to distinguish this case from that. I say that according to *In re Allen* the business was not undertaken here till the 13th of June, since there had been no communication with the clients, and in *In re Allen* the accepting a retainer was considered as fixing the time of undertaking the business. There cannot be an "undertaking" without authority, the word must mean engaging with the client to do the business.

[LOPES, L.J.:—If a solicitor begins to do work without authority, and then the client authorizes it, does not the ratification relate back so as to carry back the "undertaking" to the time when the solicitor began to do the work?]

I should say No. The solicitor is not bound to go on with the work unless he has communicated with his client, there is therefore no undertaking it in any proper sense of the word.

[LOPES, L.J.:—Does not the rule mean that the solicitor must elect before doing, in connection with the business, anything for which he would be entitled to be paid?]

The rule says before he has undertaken the business, and he has not undertaken it while he remains at liberty to withdraw. The business done was not really the business which Messrs. *Smith & Wilmer* originally contemplated, the alteration in the length of the abstract having entirely altered the circumstances.

(1) *Ante*, p. 433.

[LINDLEY, L.J. :—It occurs to me that possibly the correspondence may amount to a contract that the solicitors should be paid under the old system.]

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COTTON, L.J. :—

This is an appeal from a decision of Mr. Justice *Kay*, who held that a notice of election to be remunerated according to the old system as modified by Schedule II., and not according to the scale in Schedule I., was too late. The clients were first mortgagees, and the trusts of the equity of redemption were being administered in a suit to which they were not parties. An order was made giving the first mortgagees liberty to sell under their power for £800. The negotiations with the purchaser went off, and subsequently an order was made giving them liberty to sell for £775. On the 13th of June, 1885, the solicitors wrote the letter electing to be paid not according to the scale, and the question is whether before that time they had undertaken the business, rule 6 requiring the election to be declared "before undertaking any business." It was decided in *In re Allen* (1) that the business includes everything covered by the scale charge, though it be only something connected with the main business, and that the business has been undertaken if anything covered by the scale charge has been done.

Now before the 13th of June what had taken place? The solicitors of the owners of the equity of redemption communicated by letter with Messrs. *Smith & Wilmer*, who were known to act for the first mortgagees about this property. Messrs. *Smith & Wilmer* received the letter, and acted upon it by doing various matters which would be covered by the scale charge. It is urged that they cannot be said to have undertaken the business, because they had not had any communication with their clients in the matter. I do not give any opinion how the case would stand if a solicitor who had no business relations with *A. B.* assumed to act for him, and then went to him saying, "I have taken these steps on your behalf without authority, may I act for you in the matter?" Here the solicitors had acted for the first mortgagees for more than a year in relation to this property. I do not forget

(1) *Ante*, p. 433.

C. A. 1887 HESTER v. HESTER. Cotton, L.J.

what was said by Lord Justice *James* in *Saffron Walden Second Benefit Building Society* v. *Rayner* (1), that it is a fallacy to suppose that a man has got a solicitor as an official solicitor, who, because he has been in the habit of acting for him, is to be considered his agent, to bind him by what he says, or to bind him by receiving notices or information. But in my opinion where a man employs a solicitor as to a particular property, the solicitor has a general authority—not to do acts which bind the client without communication with him, but to enter into negotiations on his behalf. Here, before the 4th of June, 1885, Messrs. *Smith & Wilmer* having this general authority, prepared a draft contract, and sent it to the proposed purchaser. Their acts not having been repudiated by their clients, they must be treated as having acted by their authority all along, and as having undertaken the business, not on the 13th of June, but at a much earlier date, on the strength of an implied authority which has been ratified. Their notice of election, therefore, came too late.

It is said that after Messrs. *Smith & Wilmer* had begun to deal with the contract, an alteration was made as to the length of the abstract to be furnished, which made such an alteration of circumstances that the business to be done cannot be considered the same as was originally undertaken. If the alteration had been the substitution of one estate for another, then probably there would have been the undertaking of a different business, but here the negotiations relate to the same estate, and there is only a variation in the terms of the contract. The case is a hard one on the solicitors, but as the scale fee for a sale covers all expenses connected with the contract, though incurred before the contract is entered into, for Schedule I. expressly states that the scale fee to the vendor's solicitor includes the preparation of the contract (if any), we cannot avoid holding that work covered by the scale fee had been done before the 4th of June, and that the business had therefore been undertaken before that date.

It was suggested by the Lord Justice *Lindley* that what passed may have amounted to a contract that the remuneration should not be according to the scale. But this question is not raised by the objections taken in to the Taxing Master, nor is there any-

(1) 14 Ch. D. 406.

thing to shew that the client agreed to the terms of the notice. This point ought to have been brought before the Taxing Master and evidence adduced upon it, and as that was not done, we are precluded from considering the question. Supposing such an agreement with the client were proved, the solicitors still would not have a clear case, for if they had lost their opportunity of giving an effectual notice of election, it is questionable whether any agreement by their client with them as to their remuneration would bind the subsequent mortgagees or the parties entitled to the equity of redemption. The appeal must be dismissed.

LINDLEY, L.J.:—

I have come to the same conclusion. The bill is made out according to the old system as modified by Schedule II. The Taxing Master thought that wrong, and considered that the remuneration must be according to the scale. An objection to his taxation was taken in, not on the ground that there was an agreement for remuneration otherwise than according to the scale, but on the ground that the solicitors on the 13th of June had given notice of election to be remunerated according to the old system. The right to elect is quite independent of agreement, and as the solicitors' objections went on the right to elect, we are confined to the question whether they had that right. This turns on the question whether they had previously "undertaken the business." I admit that the case is different from *In re Allen* (1), because here the client had given them no directions to act for him before the 13th of June. But if a solicitor commences a business on the faith of a general retainer, and in the belief that his client will adopt what he does, he cannot be heard to say that the business was not undertaken when he first did any work covered by the scale fee. I therefore agree that the notice of election was too late.

LOPES, L.J.:—

I am of the same opinion, and have nothing to add.

Solicitors: *Smith & Wilmer.*

H. C. J.

(1) *Ante*, p. 433.

C. A.
1886
NORTH, J.
Nov. 20;
1887
Jan. 15.
C. A.
1887
Jan. 24.

In re MARTIN'S TRUSTS.

LAND, BUILDING, INVESTMENT, AND COTTAGE IMPROVEMENT COMPANY *v.* MARTIN.

[1886 L. 2948.]

In re MARTIN (A PERSON OF UNSOUND MIND).

Appointment of New Trustee—Vesting Order—Jurisdiction—"Person of unsound mind"—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *ss.* 2, 34 [*Revised Ed. Statutes, vol. x., pp.* 982, 990].

A person is of "unsound mind" within the meaning of the *Trustee Act*, 1850, where from permanent incapacity of mind he is incapable of managing his affairs, though his state of mind is not such that he would be found lunatic on inquisition.

In re Phelps' Settlement Trusts (1) not followed.

North, J., in an action in the Chancery Division, gave a judgment removing a trustee of unsound mind and appointing a new trustee in his place, but declined to make an order under sect. 34 of the *Trustee Act*, 1850, vesting the estate in the new trustee, considering that it ought to be applied for in Lunacy. The Lords Justices sitting in Lunacy made the vesting order.

H. O. MARTIN was the secretary of a company called the *Land, Building, Investment, and Cottage Improvement Company, Limited*, the business of which consisted (*inter alia*) of the purchase of land and its resale to purchasers in small lots for the purpose of building. In the year 1880 the company purchased an estate known as the *Kilburn* estate, and on the 9th of December, 1880, the estate was conveyed to *Martin* in fee, the conveyance purporting to be made to him as absolute beneficial owner; but the whole of the purchase-money was paid by the company. No declaration of trust was executed by *Martin*. He continued to hold the office of secretary until April, 1886, when he became incapacitated by illness from attending to business. Before his incapacity the property was divided into lots, and some of the lots were sold and conveyed to the purchasers thereof; other lots were sold to purchasers, but conveyances of them to the purchasers had not been executed: other lots remained unsold.

(1) 31 Ch. D. 351.

A petition was, in November, 1886, presented by the company to the Chancery Division, asking that *Martin's* son, who had succeeded his father as secretary to the company, might be appointed trustee of the property in place of his father, and that those lots which had been sold, but had not been conveyed to the purchasers, and also the unsold lots, might vest in *Martin* the son for all the estate and interest therein of his father, but upon and subject to the trusts affecting the same respectively.

The evidence of the medical man who had attended *Martin* was: "I found him to be suffering from softening of the brain, and he was then, and always will be, unable to attend to or comprehend any business matter whatsoever. In my opinion he is not a lunatic or person of unsound mind, but he has general paralysis of the brain centres and loss of nerve power, and cannot recover, or be able to attend to any business."

1886. Nov. 20. *A. Beddall*, for the company:—

There is an "implied trust" in the present case, and, by sect. 2 of the *Trustee Act*, 1850, the words "trust" and "trustee," as used in that Act, are to "extend to and include implied and constructive trusts." No doubt it has been held in some cases, such as *In re Carpenter* (1), that the Act does not apply to the case of an infant heir of a deceased vendor of land, unless the heir has been declared in a suit for specific performance to be a trustee for the purchaser.

[NORTH, J., referred to *In re Cuming* (2).]

The purchase-money having been all paid by the company, the present case resembles *In re Cuming*. There is clearly an implied trust.

Sect. 34 of the *Trustee Act* applies to a case like the present, and it is not necessary to apply to the Lunacy jurisdiction for a vesting order: *In re Phelps' Settlement Trusts* (3).

NORTH, J.:—

I think it would be better for the company to issue a writ. The property is real estate, divided into a great number of lots: and

(1) Kay, 418. (2) Law Rep. 5 Ch. 72.
(3) 31 Ch. D. 351.

C. A. 1887 — *In re* MARTIN'S TRUSTS. LAND, BUILDING, INVESTMENT, AND COTTAGE, IMPROVEMENT COMPANY *v.* MARTIN. *In re* MARTIN (A PERSON OF UNSOUND MIND).

questions of title may arise. If an action was brought, I think there would be no difficulty in declaring *Martin* (the father) to be a trustee of the unconveyed land for the company; assuming, that is, that all the purchase-money has been paid by the company, and that there is nothing due by the company to him. But if he is of unsound mind, application for a vesting order may have to be made to the jurisdiction in Lunacy. Let the petition stand over generally, with liberty to amend.

The company, on the 26th of November, 1886, commenced an action against *H. O. Martin*, the retired secretary.

By their statement of claim (the allegations in which were the same as those in the petition) they claimed a declaration that the Defendant was a trustee for the company of all the land which had been conveyed to him, except those plots which had been already conveyed to the purchasers; that the Defendant might be removed from being a trustee of the land; that *H. O. Martin* (the son) might be appointed a new trustee in the place of the Defendant, and an order made vesting the property in the new trustee.

1887. Jan. 15. The action now came on upon motion for judgment.

A. Beddall, for the Plaintiffs:—

The Defendant is not a lunatic or of unsound mind, and therefore the Chancery Division has jurisdiction to make a vesting order: *In re Phelps' Settlement Trusts* (1). A person of "unsound mind," as distinguished from a lunatic, means one who would, upon an inquisition, be found to be lunatic.

[NORTH, J.:—The evidence in this case as to the condition of the trustee is very like that in *In re Dewhirst's Trusts* (2), in which case Lord Justice *Cotton* was evidently of opinion that the trustee was of unsound mind, and that the jurisdiction to make a vesting order was in the Court acting in Lunacy.]

There was nothing but a *dictum* on that point, and *In re Phelps' Settlement Trusts* was not cited.

(1) 31 Ch. D. 351. (2) 33 Ch. D. 416.

At any rate the Chancery Division has power in an action to remove a trustee who is incapacitated by any cause, and to appoint a new trustee in his place, and, that being so, sect. 34 (1) of the *Trustee Act*, 1850, gives jurisdiction to make a vesting order.

[NORTH, J.:—Has the Court of Chancery ever made a vesting order under sect. 34 in the case of a lunatic trustee?]

Not on a petition. But there is power to do so in an action, though I have not been able to find any case in which it has been done. But the words of sect. 34 are perfectly general.

Micklem, for the Defendant.

NORTH, J.:—

I will do all that is asked by the claim, except making the vesting order. It is a question of the title to the legal estate in the property, and, as the evidence about the condition of the trustee is so very similar to that which was given in *In re Dewhirst's Trusts* (2), I think that, having regard to what was then said by Lord Justice *Cotton*, it would be better that the application for a vesting order should be made to the Lords Justices. I will give leave to amend the petition by entitling it in Lunacy as well as in Chancery, and generally.

W. L. C.

An order was accordingly made in the action, declaring *Martin* the elder to be a trustee for the company within the meaning of the *Trustee Act*, 1850, removing him from being a trustee, and appointing the son a trustee in his room.

The petition was then amended, by intituling it in Lunacy as well as in Chancery, stating the judgment in the action, and confining the prayer to asking for a vesting order.

(1) Sect. 34 provides that "it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees either by the same or any subsequent order to direct that any lands subject to the trust shall vest in the person or persons who upon the appointment shall be the trustee or trustees for such estate as the Court shall direct."

(2) 33 Ch. D. 416.

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In re MARTIN'S TRUSTS.

LAND, BUILDING, INVESTMENT, AND COTTAGE IMPROVEMENT COMPANY *v.* MARTIN.

In re MARTIN (A PERSON OF UNSOUND MIND).

1887. Jan. 24. *A. Beddall*, for the Petitioner:—

I submit that under sect. 34 there was jurisdiction in Chancery to make a vesting order on the appointment of a new trustee, that section being perfectly general in its terms. Mr. Justice *North*, however, considered that the order could not be made in Chancery, and that after what was said by Lord Justice *Cotton* in *In re Dewhirst's Trusts* (1) it should be made in Lunacy. The case of *In re Phelps' Settlement Trusts* (2), however, raises a doubt whether the order can be made in Lunacy, as it lays down that a person of unsound mind means a person who would be found lunatic upon inquisition.

[COTTON, L.J.:—I have some difficulty in following that. At all events we have jurisdiction to make the order one way or other. The case may be mentioned again when Lord Justice *Lindley*, who laid down the rule in *In re Phelps' Settlement Trusts*, comes into Court.]

Micklem, for the guardian *ad litem*.

[Lord Justice *Lindley* having come into Court, and conferred with Lord Justice *Cotton*,]

COTTON, L.J.:—

In my opinion this gentleman is shewn to be of unsound mind within the meaning of the *Trustee Act*, 1850. The Lord Justice *Lindley* tells me that he thinks he made too refined a distinction in *In re Phelps' Settlement Trusts*, where he expressed the opinion that, to be of unsound mind within the meaning of the Act, a person must be in such a state that he would be found lunatic on inquisition. In the case of *In re Dewhirst's Trusts* (3) I expressed the opinion that a person who was paralytic and unable, through infirmity of mind, to manage his own affairs, was of unsound mind, and I adhere to that opinion, and with the more confidence as Lord Justice *Lindley* does not adhere to the opinion given by him in *In re Phelps' Settlement Trusts*. I think that a person is of unsound mind within the meaning of the Act

(1) 33 Ch. D. 416. (2) 31 Ch. D. 351.
(3) 33 Ch. D. 416, 419.

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when, from continuing infirmity of mind, he is incapable of managing his affairs. He could not be considered of unsound mind within the Act if his incapacity was a temporary one, arising from an accident—as, for instance, concussion of the brain, or from illness of a temporary character; but he is to be so considered where he is subject to a permanent incapacity of mind, rendering him incapable of attending to business. In my judgment the medical evidence in this case shews clearly that this gentleman is incapable of attending to business, owing to permanent infirmity of mind, and the order will be made in Lunacy. It is not, however, necessary to amend the petition for the purpose of making it in Lunacy only.

Solicitor for Plaintiffs: *F. J. Mann.*

Solicitor for Defendant: *J. L. G. Powell.*

H. C. J.

In re VAN DUZER'S TRADE-MARK. *In re* LEAF, SONS, & CO.'S TRADE-MARK.

C. A. 1886 V.-C. B. *July* 9, 30. C. A. 1887 *Jan.* 25, 26, 27, 28.

Trade-mark—Registration—"Fancy word not in common use"—Geographical Word—Patents, Designs, and Trade Marks Act, 1883, *s.* 64, *sub-s.* 1 (*c*).

The fanciful or abnormal use of a word not in itself obviously non-descriptive, does not make it a "fancy word" within the *Patents, Designs, and Trade Marks Act*, 1883, s. 64, sub-s. 1 (*c*), so as to be capable of registration as a trade-mark. And in order to obtain registration of a word as having become "distinctive" within sect. 64, sub-sect. 3, by user or recognition in the trade, such user or recognition must have been prior to August, 1875.

Accordingly applications for a direction to the Comptroller-General to proceed with the registration as trade-marks of the words "*Melrose Favourite Hair Restorer*" and "*Electric Velveteen*," the use of which by the applicants would, independently of the Act, by user and recognition in the trade since August, 1875, have been entitled to protection, were, in both cases, reversing *Bacon*, V.-C. (1), refused.

In re Trade-mark "Alpine" (2) questioned.

THESE were two appeals from decisions of Vice-Chancellor *Bacon* directing the Comptroller-General to proceed with the registration as "fancy words not in common use," within the

(1) See W. N. 1886, p. 135, and 33 Ch. D. 477. (2) 29 Ch. D. 877.

C. A. 1887

In re VAN DUZER'S TRADE-MARK.

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meaning of the *Patents, Designs, and Trade Marks Act*, 1883, sect. 64, sub-sect. 1 (*c*), of, in *Van Duzer's* case, "*Melrose Favourite Hair Restorer*," and in *Leaf, Sons, & Co.'s* case "*Electric Velveteen*" as trade-marks.

The appeals were placed in the paper together, and, though argued separately, one judgment was given in both cases.

VAN DUZER'S TRADE-MARK.

In the year 1880 *Van Duzer*, a wholesale and export druggist of *Southampton Row, London*, commenced manufacturing a toilet preparation under the name of "*Melrose Favourite Hair Restorer*," and the article had since acquired a considerable reputation under that name, both in this country and abroad. "*Melrose*" was suggested by the famous abbey of that name. In geographical connection with the abbey is a village or small town of the same name, containing some 2000 inhabitants.

In 1881, *Van Duzer* registered, under the *Trade Marks Registration Act*, 1875, a label with a device of which the above words formed part, the law then not admitting of the registration of a mere fancy name. On the 18th of September, 1885, he applied for registration under sect. 64 of the *Patents, Designs, and Trade Marks Act*, 1883, of the words "*Melrose Favourite Hair Restorer*" alone as a trade-mark; but the Comptroller-General refused to proceed with the application on the ground that "*Melrose*" was a geographical word, and that he had been recently advised that a geographical name in the *United Kingdom* did not fall within the section. *Van Duzer*, accordingly, now moved that the Comptroller-General might be directed to proceed with the application.

The evidence in support of the motion shewed that the word "*Melrose*" had never been used by any one but the Applicant in connection with preparations for the hair, and that the name had, in fact, become identified with the Applicant's preparation. It also appeared from the evidence that the Applicant's patent agent referred the Registrar of Trade-marks, who heard the case on behalf of the Comptroller, to the recent decision of Mr. Justice *Chitty* in *In re Trade-mark* "*Alpine*" (1), but that the Registrar declined to recognise that authority on the ground that the

(1) 29 Ch. D. 877.

Comptroller had intended to appeal against the decision, though, owing to an oversight, notice of appeal had not been lodged in time. The Applicant's patent agent also proved that the Comptroller had already registered as new marks under the Act of 1883 several geographical words, such as "*Cyprus*," "*Willesden*," "*Brunswick*," and "*Balmoral*."

The motion was heard before Vice-Chancellor *Bacon* on the 9th of July, 1886.

Aston, Q.C., and *Sebastian*, for the application :—

The question is whether a geographical word can be registered as a "fancy word" within the meaning of sect. 64, sub-sect. 1 (*c*) of the *Patents, Designs, and Trade Marks Act*, 1883. We submit that it can. The point has already been decided by Mr. Justice *Chitty* in *In re Trade-mark* "*Alpine*" (1), where he held that the word "*Alpine*," if not a fancy word, was at least a fanciful word, and, as such, within the section. As his Lordship points out in his judgment, the enactment was passed to remedy the inconvenience of the old law under which a fancy word was not capable of registration: *Ex parte Stephens* ("*Aeilyton*" *ink*) (2). But even under the old law, when a particular article went into the market and acquired a reputation under a particular word, whether geographical or otherwise, the vendor of the article acquired a property in the word as a fancy name, which thus became a good trade-mark and one capable of being protected by the Court: *McAndrew* v. *Bassett* ("*Anatolia*" *liquorice*) (3); *Braham* v. *Bustard* ("*Excelsior White Soft Soap*") (4); *Wheeler* v. *Johnston* ("*Cromac Springs*") (5); *Hirst* v. *Denham* ("*Turin Cloth*") (6); *Browne* on the Law of Trade-marks (7). So here we have, by long user, acquired a property in the word "*Melrose*," which is, therefore, entitled to protection, and may, under the present law, be registered as a "fancy word." The word has acquired, in fact, a secondary meaning as indicating our manufacture: *Linoleum Manufacturing Company* v. *Nairn* (8); *Wother-*

(1) 29 Ch. D. 877.
(2) 3 Ch. D. 659.
(3) 4 D. J. & S. 380.
(4) 1 H. & M. 447.
(5) 3 L. R. Ir. 284.
(6) Law Rep. 14 Eq. 542.
(7) Boston, 1873, p. 653.
(8) 5 Ch. D. 834, 837.

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spoon v. *Currie* ("*Glenfield Starch*") (1). A particular name or word adopted by a trader in connection with a particular article, though it may be in common use for other purposes, is not in common use as regards the purposes contemplated by the trader, and if it is fancifully applied to the article, it is a "fancy word not in common use" within the meaning of sect. 64. Here we have a "fancy word not in common use" fancifully applied. The word "*Melrose*," though geographical and in one sense in common use, is not in common use, as the evidence shews, in connection with such an article as ours. It is a word distinctive of the article, and possesses no geographical meaning as used by us. The 64th section should be read in connection with the 74th, as meaning a "fancy word not in common use in the trade in the goods in respect of which the application is made." The distinction appears to be that where a fancy word is in common use in the trade it may be registered under sect. 74 as an addition to any of the "essential particulars" mentioned in sect. 64; but that where a fancy word is not in common use in the trade it may be registered either by itself or with additions as being in itself an "essential particular" within sect. 64. For instance, the words "*Bank of England*," as applied to sealing-wax, were ordered to be taken off the register as being common to the trade: *In re Hyde & Co.'s Trade-mark* (2): and such a word as "*Glenfield*" which was applied to starch, may be registered as a fancy name applicable to the particular article: *Wotherspoon* v. *Currie* (3).

Sir *Horace Davey*, S.G., and *Ingle Joyce*, for the Comptroller General:—

The question is whether "*Melrose*" is a "fancy word not in common use" within the meaning of sect. 64. We submit that no word which is or may be descriptive is a "fancy word," and no geographical name in the *United Kingdom* can be a fancy word as applied to an article because it is more or less descriptive, for it *primâ facie* imports an article made in or coming from that locality. "*Melrose Favourite Hair Restorer*" may imply, and does *primâ facie* imply, that the article is made by some manu-

(1) Law Rep. 5 H. L. 508, 514. (2) 7 Ch. D. 724.
(3) Law Rep. 5 H. L. 514.

facturer at *Melrose*. The general principle of the Comptroller is not to allow a geographical name in the *United Kingdom* to be registered because it is *primâ facie* descriptive, and in many cases purely descriptive, as for instance, "*Dublin*" as applied to whiskey. Suppose the Applicant here carried on business at *Melrose*, the Comptroller would rightly refuse to register the word, because the Applicant can have no right over other inhabitants of *Melrose* to monopolise the word; and no person not living at *Melrose* has any more right to monopolise the name. If an inhabitant is not entitled to monopolise the name, *à fortiori* a person not an inhabitant is not so entitled. If "*Dublin*" whiskey cannot be registered as being descriptive, no other name of a place can be registered, because the article denoted by the name might be made at that place, and the name would then be purely descriptive. "*Eureka*" and "*Excelsior*" are good fancy words, because they do not import anything as to the locality from which the article comes. All the cases that have been cited are, with the exception of *In re Trade-mark* "*Alpine*" (1), cases before the Act of 1883. As to the "*Alpine*" case, Mr. Justice *Chitty* altered the meaning of the Act, instead of reading the the words literally, as he should have done. The learned judge said that by a "fancy word" the Act meant a word "fanciful" in its application, whereas the Act says a "fancy word or words not in common use." Even assuming that the Act does mean a word "fanciful" in its application, the application of this word "*Melrose*" to a particular class of goods is not fanciful, for since the application of the name of a town to goods imports goods proceeding from that locality, it is *primâ facie* descriptive and not fanciful.

A "fancy word" must be a word having no meaning in itself, as for instance, "*Eureka*," "*Excelsior*," or "*Opoponax*." We submit that Mr. Justice *Chitty's* reasoning in the "*Alpine*" case should not be followed, since he construes the Act in a manner the words will not bear.

Aston, in reply:—

The real point is that a geographical word may be used in more

(1) 29 Ch. D. 877.

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than one sense, that is to say in a primary and in a secondary sense: *Wotherspoon* v. *Currie* (1); and here the word "*Melrose*" has acquired a secondary meaning in connection with our particular manufacture.

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BACON, V.C.:—

Nobody can complain of the Comptroller, who is a public officer, having raised this question before me, because he desires to have a construction put upon the Act of Parliament in order that the discharge of his duty may be safe and consistent for the future.

The question has been argued at very great length, but the whole argument really turns on the words of the Act of Parliament —words which are not indistinct, and which are these: "A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use." The question before me is whether this manufacturer, the present Applicant, who for many years has sold his commodity under the name which he desires to have registered, is prevented, under the terms of the Act of Parliament, from having it registered because one of the words he uses, and the main word, is said not to be a "fancy word." Innumerable instances exist of the sale of commodities of all sorts under a distinctive appellation. It is not necessary that the appellation should be geographical, or personal, or in any sense descriptive; and particularly, in this perfumery trade, for centuries, "*Mille-fleur*" and a hundred other names, all purely fanciful names, have been given to commodities sold in it. The argument here is that, inasmuch as "*Melrose*" is a place well known and having a geographical signification, it ceases, when it is applied to a pot of pomatum, or whatever the article may be, to be a fanciful expression. In my opinion it is a fancy expression and one which has been proved to be "not in common use" other than for the commodity to which it is applied. If I wanted any confirmation of this view, this same Act of Parliament, in dealing with a different subject, says, in clause 74, "any distinctive . . . word or figure, or combination of . . . words, or figures, though the same is common to the trade in the goods with respect to which

(1) Law Rep. 5 H. L. 521.

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the application is made." Can I hesitate to apply these words I have read to the words I find in the 64th section—"not in common use?" That the word "*Melrose*" may have, as Mr. *Aston* has argued, several senses nobody will dispute. If I am asked whether upon this label, now sought to be registered, the word "*Melrose*" is descriptive of a place, I say it is not. It neither is nor is meant to be. Then, if it is not descriptive of a certain geographical spot, what is it? Can it be anything but a fancy word? What connection is there between this hair-restorer manufacturer and "*Melrose*?" He does not say he makes the article at "*Melrose*," but out of his mere fancy he puts a name and a mark upon the commodity he vends and says, "I sell it and I call it '*Melrose*' that all the world may know that it is my manufacture and nobody else's." Under that mark for many years it has been sold in the public market; and that mark has become the very thing which the Act of Parliament says may be registered. Construing sect. 64, sub-sect. 1 (*c*), by applying the words of sect. 74, I say that, in my opinion, "*Melrose*" is a fancy word not in common use in the trade in which it is applied.

Cases have been cited more or less resembling, and approaching in some greater or less degree, the question which we have been discussing, but the case before Mr. Justice *Chitty* appears to me to be directly in point. I can perceive no difference in substance between the case before him and the case now before me; and I have no inclination to differ in the slightest degree from the conclusion that he drew. He had, as I have, to construe the words of the Act of Parliament. He had to find out, as I have to do, whether the word sought to be registered was a fancy word or a geographical word, and he came to the conclusion that the word "*Alpine*" was not a geographical description. I also come to the conclusion, without hesitation, that the word "*Melrose*" is not a geographical description, if it were the Registrar would be right in refusing registration—but that it is a purely fancy word, or a purely fanciful word, as much fanciful as "*Eureka*," or "*Opoponax*," when applied to a particular commodity, and is meant only to designate that commodity, and to do it neither to the hindrance nor disparagement of any other person. It cannot be said that, supposing any perfumer was to

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set up in business at "*Melrose*," he would be injured by this particular commodity being called "*Melrose*." He may call his commodity by any name he likes, but he cannot adopt "*Melrose*," because "*Melrose*" is the fancy word which under the statute has been affixed to this commodity. He cannot adopt "*Melrose*," but he may choose any other word. A man who is not a manufacturer of perfumery may make "*Melrose*" horseshoes as much as he likes, but if he is a manufacturer of perfumery he cannot copy, or imitate, or adopt a name which, under this statute and upon the principle of every one of the decisions which have been referred to, has become the absolute property of the present Applicant.

I attach no weight to what is said to be the practice in the office of the Comptroller. It appears that this discovery which he has made, or that somebody has made for him, is of comparatively recent origin. It was not until lately that he thought that the registration of a name of a place was objectionable on the ground of being geographical. The schedule to one of the affidavits which has been read to me contains many instances in which, without hesitation, the Comptroller has registered the name of a place as the trade-mark of the Applicant for registration.

In my opinion the present Applicant is perfectly well entitled to have registered his trade-mark of "*Melrose Favourite Hair Restorer*" which is really only one word—it is a compound word. It is "*Hair Restorer*," the other two words accompanying it being mere adjectives of a descriptive character. "*Melrose Favourite Hair Restorer*" is the trade-mark for a hair restorer. It is a particular name and no more. I think, therefore, that the application to register must proceed.

Upon the question of the costs of the application,

The *Solicitor-General* submitted that as the present application was part of the application for registration, the Applicant ought to pay the Comptroller's costs.

Bacon, V.C.:—I shall give the Comptroller no costs, as the case is covered by a previous decision.

G. I. F. C.

From this decision the Comptroller-General appealed. The appeal came on to be heard on the 25th of January, 1887.

Sir *R. E. Webster*, A.G., and Sir *H. Davey*, Q.C. (*Ingle Joyce* with them), in support of the appeal:—

"*Melrose*" being the name of a place is descriptive, and not in any sense of the term a fancy word within sect. 64, sub-sect. 1 (*c*). And as it does not describe the place where the article is manufactured, it is a word, the exclusive use of which would be calculated to deceive, and therefore by sect. 73 of the Act of 1883 cannot be registered. It was never intended that words, not in themselves "fancy words," should be registered; and in the case of a merely geographical word, besides that it cannot be said to be a fancy word not in common use within sect. 64, sub-sect. 1 (*c*): *Friedlander's Trade-mark* ("*Zephyr Asiatic Walnut Pipe*") (1), it would be very unjust that inhabitants of *Melrose* who might require to call their goods by that name, should be debarred from so doing because the Applicant, who does not live there and does not manufacture his hair-wash there, has obtained an exclusive right by registration to use the name. The Vice-Chancellor seems to have thought that "fancy word" meant merely a common word, the application of which to the particular commodity was novel and fanciful. We submit that "fancy word" means either a word coined for the purpose, and having no meaning in the English language, or, like "*Eureka Shirts*," a word which has no meaning when applied to the particular article.

Aston, Q.C., and *Sebastian*, for the Respondent *Van Duzer*:—

A geographical term, from being used in a fanciful abnormal sense, not in any way descriptive of the place where the article is produced, but denoting the manufacture or importation by the particular person who first adopted the name, would have been entitled to protection before the Act as a trade-name: *McAndrew* v. *Bassett* (*Anatolia Liquorice*) (2); and since the Act of 1883 may become a "fancy word" capable of registration: *Blair* v. *Stock* (*Strathmore Whisky*) (3). We are not applying to

(1) W. N. 1885, p. 85. (2) 4 D. J. & S. 380. (3) 52 L. T. (N.S.) 123.

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register a geographical word which the Applicant is now for the first time proposing to adopt, but a word which, from six years' user all over *Europe*, has acquired a secondary or fancy signification in connection with the particular manufacture, and become identified in the trade with the article manufactured by the Applicant so as to become his property: *Wotherspoon* v. *Currie* (*Glenfield Starch*) (1); *Johnston* v. *Orr Ewing & Co.* (2).

The exercise of the old jurisdiction in equity to protect a man who has acquired by user a right and property in a particular word or mark has been in no way interfered with by the recent Acts on trade-marks: *Mitchell* v. *Henry* (3).

[LINDLEY, L.J., referred to *In re Saunion & Co.* ("*Anglo-Portugo Oyster*" case) (4), where registration of these words was refused on the ground that they were either deceptive, if the oysters did not come from *Portugal*; or descriptive if they did, or if the words denoted a particular breed and not the country of origin.]

Can a geographical word under no circumstances become a "fancy word not in common use," by recognition in the trade as such, so as to be capable of registration? That the term "fancy word" had a special signification or recognition before the Acts of 1883 or 1875 is clear from *Hirst* v. *Denham* (5); *Brown* on the Law of Trade-marks (6).

Sir *H. Davey*, in reply:—

A "fancy word" must speak for itself, and cannot acquire that character merely from the connection in which it is used. It must not be capable of only describing the place at which the article is or may be manufactured. For it would be absurd if a man who resides in *London* could describe his goods as *Melrose* goods, so as to prevent another, who may reside at *Melrose*, from so doing.

LEAF, SONS, & CO.'S TRADE-MARK.

This was also an appeal by the Comptroller-General from an order of Vice-Chancellor *Bacon* directing the Comptroller to

(1) Law Rep. 5 H. L. 508, 514, 521.
(2) 7 App. Cas. 219.
(3) 15 Ch. D. 181.
(4) Seb. Dig. 381.
(5) Law Rep. 14 Eq. 542.
(6) Boston, 1873, p. 653.

proceed with the registration of the words "*Electric Velveteen*" as a trade-mark for velvets and velveteens, being cotton piece goods in Class 24.

The case before Vice-Chancellor *Bacon* is reported (1). The appeal came on to be heard on the 26th of January, 1887.

Sir *Horace Davey*, Q.C., and *Ingle Joyce* (Sir *R. E. Webster*, A.G., with them), in support of the appeal by the Comptroller-General:—

The word "electric" is not only a dictionary word in common use, but it is a favourite word indicating quality, applied, amongst other things, to brushes, straps, and bells, and to at least one colour, "electric blue." As applied to velveteens, it is descriptive of bright sheeny reflection and heat-conducting qualities; and it is certainly not a "fancy word" within the meaning of sect. 64 of the Act of 1883.

Aston, Q.C., and *Sebastian*, for the Applicants:—

We do not designate as electric merely our velveteens of a particular class, such as those manufactured with silk, in which case the word might possibly be suggestive of quality; but we apply it to cotton piece goods, with which it has no connection, but through the fancy.

This is a new and fanciful application, not descriptive in any way, and the word is a fancy word as much as "*Gem Gun*" in *In re Arbenz' Application* (2). And in this restricted use "*Electric Velveteens*" mean the goods of *Leaf & Co.*; so in a trade sense alone is the word descriptive. To construe the expression, "in common use," as meaning in "general common use," is to carry it too far. A "fancy word not in common use" should be construed to mean "not in common use in the trade"—one which has a strained and fanciful application, a non-ordinary use. This word "electric" is obviously meaningless as applied to cotton piece goods in its ordinary sense. Before the Act a trader acquired his rights by user: since the Act he has no rights until registration. "Electric" is a trade word, in the use of which the applicant would have been protected before the Act, as much as

(1) 33 Ch. D. 477. (2) 3 Rcp. Pat. Cas. 345; 55 L. T. (N.S.) 480.

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in *Field* v. *Lewis* (1), where the plaintiffs were protected in the use of their "*United Service*" soap, and is, we submit, a word "distinctive" of our goods, and as such capable of registration under sect. 64, sub-sect. 3: *In re James' Trade-mark* (2). The Act ought not to be read so as to deprive the trader of his right to register a word in respect of which he could from user have previously obtained protection: *Mitchell* v. *Henry* (3).

Sir *H. Davey*, in reply:—

The argument is that the word "electric" has acquired a secondary meaning. But the Applicants have not shewn that it has lost its primary meaning.

[He was stopped by the Court.]

COTTON, L.J.:—

There are two appeals to us from decisions of Vice-Chancellor *Bacon*, and he has determined that the Respondents in each appeal were entitled to have registered what they desired to register as their trade-marks. There is a great deal common to both cases, and therefore in the first instance I will make some general observations applicable to both.

A good deal was said about the intention and object of the Acts of 1875 and 1883. What we have really got to do is to construe one particular clause in one of those Acts. In my opinion we must take it that, although the intention of the Act was to benefit traders—persons whose goods are known by a particular mark—by giving them, if they registered under the Act, this privilege, that they do not require to enter into evidence at all after five years, and during the five years they have *primâ facie* evidence of their rights; the Act was also intended to protect the public, by having a register of marks, so that they might know what it was that was protected by the trade-marks adopted, and also by cutting down the numerous forms of words and other things, by the use of which traders tried to secure to themselves exclusive rights. Certain things only could be registered, after the passing of the Act, so as to get the benefit which

(1) Seb. Dig. 167. (2) 33 Ch. D. 392.
(3) 15 Ch. D. 181.

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I pointed out—subject to this, that if there had been a right acquired to a particular device or particular form of words, as having become descriptive of the goods of a particular trader before August, 1875, then such device or form of words might be registered under the Act, although it did not come within the definition of what could otherwise be registered as a trade-mark under the Act.

In the present case what we have to consider is whether the two words which are desired to be registered under the Act are fancy words within the meaning of sub-sect. 3 of sect. 64 of the Act of 1883. It has also to be considered whether they are "distinctive," and "not in common use"; but the stress of the argument on each side has been on the question whether these two words desired to be registered can be considered "fancy words" within the meaning of that section. Now in both cases there has been evidence adduced and relied on by the Respondents. The evidence in each of these cases has been that, in the one case the word "*Melrose*," and in the other the word "*Electric*," have been used for a very considerable time, and that the trade have recognised goods to which those words were affixed as being the goods of the applicants for registration; that is to say, the evidence goes to this, that if the Act had not been passed they have, on the evidence before the Court, made out such a case as would entitle them to protection in respect of the use of these particular words. To my mind that is not pertinent here. If the words had been used before August, 1875, the Act would have given a right, in consequence of that user, to have them registered. What we have to consider is this: whether the words come within the description of those things which the Act allows to be registered before giving them the privileges of registration which I have already mentioned. Sub-sect. 3 of the 64th section of the Act of 1883 is this: "Provided that any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures used as a trade-mark before the thirteenth day of August, one thousand eight hundred and seventy-five, may be registered as a trade-mark under this part of this Act." In my opinion that excludes the Respondents from relying on user as a trade-mark subsequent to that date. But then it was said that

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this evidence might be received and regarded because it shewed that these words had become, by user by the trade, recognised as fancy words, that really means—had been recognised as trade-marks by the trade. But recognition by the trade, or the acquisition of the right to use these things as trade-marks by user, is expressly excluded from our consideration, as I understand the Act, by that sub-section which gives a right only in respect of user previous to August, 1875, to have words registered which would not otherwise have come within the description of trade-marks under the Act. Then it is said that the evidence shews that these words are now considered as fancy words in the trade. I do not think that is so, because it is only recognised as the trade-mark of this individual, and in my opinion what Sir *Horace Davey* put in reply was a matter to be considered—have the words lost their original meaning? No; and they have not come to be fancy words in any way except this, that they have been recognised by the trade as designating that the goods are the goods of the applicants—that is, recognised as their trade-marks.

Then a good many cases were relied on by the counsel for the Respondents, where previously to the Act the Court interfered in order to protect a trader from goods being passed off as his; and it was said that this must always have been on the ground that the words which were protected were recognised as fancy words, and that, therefore, we ought to consider any words which would previously have been protected, words which come within the description of fancy words contained in this Act. In my opinion that argument is erroneous. It was not necessary that words to be protected should be fancy words. The principle of the old decisions was that, if by any mark or words, or form of doing up things, goods had been recognised in the trade as the goods of a particular person, the Court would protect him; that is to say, would restrain anyone from using the same mark or words, or form of doing up, so as to pass off the goods of the latter as the goods of the former. That was the only protection, and it was not on the ground that any words were fancy words, but simply on the ground that, from user by the plaintiff, goods marked in the particular way had become recognised as his, and that the

defendant could not be allowed to use them in such a way as to pass off his goods as the goods of the plaintiff.

Certain expressions were relied on which are used by Judges in various cases saying "This is a fancy word." But it must be considered how those expressions were used. Very often they were used with reference to the act of the defendant who had applied to his own goods, words which had been used for a period of time in connection with the goods of the plaintiff, and the Judge was considering "What is the excuse? What can be the object of using these words? The article is not made at the place which is referred to; it is no description of the article; it must be a fancy word," that is to say, a word used, not for the purpose of describing any peculiarity of the goods, but of representing to the public that the goods were the goods of the plaintiff; and, therefore, the expressions were used not with reference to the construction of any statute, but with reference to the question why, and with what object the defendant used the words.

One case which was much relied on was the *Strathmore Whisky Case* (1). Now if there was anything in that case like an expression of opinion by Mr. Justice *Kay* that the word "*Strathmore*" alone could have been regarded as a word to be registered under the Act of 1883, I dissent from that view. I should have thought that this was a word which, especially as regards whisky, could not be used as a fancy name. I do not know how many *Strathmores* there are in *Scotland*, but the one which I am best acquainted with is a large valley not very far from *Glenlivat*, which has long been known for its production of whisky; and I should have thought that the word "*Strathmore*," as applicable to whisky, was deceptive, as representing that the whisky was in fact made in *Strathmore* when in fact it was not, and that, therefore, it was a word which ought not to have been registered under the Act. The plaintiff's trade-mark, which was registered, included, besides the device of the barrel of whisky with the Highlander enjoying it, the words "*Strathmore Blend.*" In the device registered by the defendant there was also prominently the word "*Strathmore*"; and what appears to me to be the result of that case is that as the defendant's whisky was not made at *Strathmore*,

(1) 52 L. T. (N.S.) 123.

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he had adopted that word not as a word applicable to his whisky, but simply to pass it off as the plaintiff's, and that consequently the plaintiff was entitled to sue and get a decree as against the defendant, and if any part of the defendant's trade-mark was calculated to deceive, then it was properly struck off without reference to the question we are now discussing.

Then Mr. *Aston* referred to a judgment of mine in *Mitchell* v. *Henry* (1), which he considered would assist him in the claim to be registered here. In that case I expressed no opinion at all as to what the rights of a plaintiff would be if he had not been registered; but an argument was adduced, I think based on some observations made by the late Master of the Rolls, that what one had to consider now, was the question, whether the defendant had taken the identical trade-mark which was protected by the Act; and if it could be shewn that he had not, then the plaintiff could have no decree in his favour. It was alleged that the mark which was put upon the defendant's goods there was so different from the registered trade-mark of the plaintiffs, that the defendant was entitled to use it. The plaintiff was entitled to sue, as he had a registered trade-mark, and as I held that the old doctrine that no one may pass off his goods as the goods of another was not abolished, the question we had to consider was this: has the defendant tried to pass off his goods as the goods of the plaintiff? And although there might be—I do not say that there was—such a difference between the two marks as to enable both to be registered, yet if the plaintiff established that the defendant was passing off his goods as the goods of the plaintiff, he was entitled to an injunction, even although the defendant's mark might have been registered as a separate trade-mark.

Having made those general observations, applicable to both cases, I will proceed to deal with them separately. The first application is to register as a trade-mark the term "*Melrose Favourite Hair Restorer.*" The question is as to "*Melrose*"; can that be registered as a trade-mark with reference to articles of toilet, and especially a hair preparation? We were asked by the Attorney-General on behalf of the Appellant, to hold that no geographical expression can come within the description in sect. 64,

(1) 15 Ch. D. 181.

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sub-sect. 1 (*c*) as "fancy word or words not in common use." In my opinion that would be wrong. I do not think one could say that no geographical term could possibly be a "fancy word or words" as applied to a particular article; but in my opinion it would be wrong to allow the registration of these words, "*Melrose Favourite Hair Restorer.*" Why? To be registered it must be a fancy word; and, in order to come within that description, it must be a word which obviously cannot have reference to any description or designation of where the article is made, or of what its character is. When one comes to hear the evidence about "*Melrose,*" it is highly improbable that this is any representation of these goods having been made at *Melrose;* but, in my opinion, we ought not to consider what the result is when that evidence is given, but we ought to consider whether, from the name, and from the description of the article to which it is applied, it is obvious, that is to say, whether any ordinary person would understand, that the name could not be intended to designate the place where this was produced. It is perfectly obvious that a very large number of geographical expressions would be calculated to lead to the impression that the article was made in a particular place. Take *Sheffield* as regards iron goods, take *Birmingham* as regards guns, and a great many fancy goods, and iron goods too. I give no opinion on what might be the result when a case comes before us where it is sought to register the name of a place which is known to all, and is obviously inapplicable to the articles—whether that should be registered or not, but here in my opinion it is not obvious that this cannot be taken as describing the goods as made at *Melrose;* and that being so, in my opinion the objection is right, and in the first case *Melrose* ought not to be registered in connection with this description of goods—"*Melrose Favourite Hair Restorer.*" I know that I am differing not only from the view of Vice-Chancellor *Bacon,* but of other Judges who have taken a different view from that which I have expressed, but our duty here is to act on our own judgment. With reference to the case which was much pressed upon us—that of the trade-mark "*Alpine*" (1)—I should certainly have come to a different conclusion from that which was come to by the learned Judge

(1) 29 Ch. D. 877.

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who decided that case, because I know that in former days, if not now, there was a great deal of embroidery made in *Switzerland* at the foot of the *Alps*, if not in what may be called the *Alps*, and I should have supposed that that term would have been calculated to express, with regard to the goods to which it was to be applied, the place at which those goods were made. In my opinion in the first case the appeal must be allowed.

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Then we come to the second case, where the Applicant desires to register the words "*Electric Velvet*" and "*Velveteen*" in respect of cotton goods. Is that word "*Electric*" to be considered as a fancy word? It was contended by Mr. *Aston* that it was used inappropriately as regards these goods, and therefore that the word was fancifully used. In my opinion a word may not be registered as a trade-mark if it is fancifully used, but only if it is a fancy word; and in my opinion we must consider whether it can properly be said that "*Electric*" is a fancy word, even though applied to velvet or velveteen. If it was obviously meaningless as regards the particular goods, possibly it might be considered as a fancy word, but "*Electric*" is a word of description, not a fancy word. I differ from the view which was pressed upon us at one time, that a word to be a fancy word must be a word not found in the dictionary. The use of a word which in itself is descriptive does not make that word a fancy word when one finds out, after having examined the character of the goods and heard the evidence about it, that it cannot properly be applied to those goods. Mr. *Aston*'s argument would come to this, that if a man takes a word which in itself is descriptive—which is *primâ facie* descriptive—and falsely and wrongly applies that to particular goods, then he may register that as a fancy word, because it is inapplicable, and must, if he wishes to speak the truth, have been used by him in an arbitrary, or different sense from that which it ought properly to bear. I cannot agree with that. When the word is, like this "*Electric*," *primâ facie* a descriptive word, it is, in my opinion, wrong to say that it ought to be registered as a fancy word simply because it is used inappropriately and wrongly as regards the particular object. I think that "*Electric*" ought not to be considered as a fancy word simply because the Respondent here says, and probably truly, that he used it fanci-

fully, or because it is not applicable to the goods in question. In my opinion that appeal also ought to be allowed.

I will only add one word as to the "*Gem*" gun case (1). The word "*Gem*" is different from "*Electric*," because "*Electric*" is a descriptive word and an adjective, and "*Gem*" is a substantive; but I must not be considered as saying that I should have decided that case in the same way as it was decided. It is not necessary to give any opinion upon it, because the word here is of a different character; and even if that case were to be considered as rightly decided, I am of opinion that "*Electric*" ought not to be allowed to be registered in connection with velvets and velveteens.

LINDLEY, L.J.:—

These two cases have raised questions of some difficulty, and if it had not been that we have had the opportunity of considering them since they were opened, I should have taken further time to look into them. The danger which we have to avoid seems to me to be this. In the first place it is quite obvious that the *Patents, Designs, and Trade Marks Act*, 1883, intended to do more for the owners of trade-marks than was done for them by the Act of 1875, and that object, to benefit them, must not be lost sight of. On the other hand it is obvious to any one who looks into the Act with care that there is very great danger in so construing the Act as to make it intolerably burdensome upon other people who have not got registered trade-marks; and we must take care that in carrying out one object of the Act we do not impose greater restrictions upon freedom of trade than are necessary for the purpose of carrying out the Act fairly and properly.

The difficulty of these two particular cases turns entirely upon the meaning of the expression "fancy word or words" in sect. 64 of the Act of 1883. If these words, "*Melrose*" in the one case and "*Electric*" in the other, are not fancy words, we need not trouble ourselves as to the true meaning of the expression "not in common use;" and, as I have come to the conclusion, after considering the matter, that neither of the words in question can be said to be fancy words, I do not propose to say anything about

(1) 3 Rep. Pat. Cas. 345; 55 L. T. (N.S.) 480.

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the further difficulty which would arise if I thought that they were fancy words.

What is meant by a fancy word is not explained by the Act of Parliament, and we are left to ascertain its meaning as best we can. In order to do so, I think we are entitled, upon every principle which we are in the habit of acting upon with reference to Acts of Parliament, to consider a little how this expression came into the Act. What was it that led to its insertion? As to this we are not in the dark. It was put in to cure the defect which came to light in the case of *Ex parte Stephens* (1), where, under the words of the Act of 1875, the Master of the Rolls found himself unable to cause to be registered a word which I suppose was intended to be Greek, but was certainly intended to be a fancy word, viz., "*Aeilyton*," with reference to ink. That he could not do, and he could not do it because under the Act of 1875 there was no provision for registering as a trade-mark any word or words, unless they had been used as trade-marks before August, 1875. That was the kind of mischief which was to be cured; and it was to cure it that there were introduced into the Act of 1883 words which were not to be found in the previous Act—I mean "fancy word or words." I do not mean to say that, because that is the history of the matter, those words are to be confined to that precise form of fancy word, but it gives us the key to what is meant; and it strikes me, I confess, that upon looking through the Act, and at the object and the history of it, we cannot say that anything is a fancy word which conveys any meaning to an ordinary Englishman. To be a fancy word I think the word must either have, to ordinary English people to whom this Act of Parliament is addressed, no meaning, like the word "*Eureka*," or the word "*Aeilyton*," or if it has any meaning at all, it must be obviously meaningless when used as a trade-mark. If it is not obviously meaningless, it appears to me it has not the characteristics of a fancy word. I do not mean to say that there are no English fancy words. I am not going the length which we were invited to go: that a man cannot take any word out of an English dictionary. I do not know what fancy words there may be in the English dictionary. I am not prepared to say

(1) 3 Ch. D. 659.

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there are none. I am not prepared to say that you must go to a Latin dictionary or a Greek lexicon, or anything else; but the word must come up to the characteristics which I have endeavoured to explain. And so again I do not pretend to say that necessarily all geographical names must be excluded. I do not know that it is necessary to go so far, but it is quite obvious that any name which is commonly known may be a name which has a meaning in connection with anything that is associated with it. If you pick out some name which no Englishman ever heard of, such as *Penj Deh*, to which our attention was called some years ago, I do not know that that would not do. I am not prepared to say that it would not do. It conveys no meaning to an Englishman, and such a geographical name, for all I know, may be a fair and proper fancy word. I am not prepared to go the length of saying that no word you can find in any map, in any part of the world, will not do, but when you come to a well-known place that is a different matter; then it does suggest a meaning, and not being obviously meaningless, it is not a fancy word as I understand this expression in the Act of Parliament. If "*Melrose*" is not a fancy word, *à fortiori* is not "*Electric*." "*Electric*" suggests a meaning. I do not mean to say it has a meaning. The more one knows of electricity perhaps the less meaning it has. We are not considering the case of trained people who understand electricity; nor are we at liberty to confine ourselves to persons in the trade who know the secrets of trade. The Act of Parliament is for an ordinary Englishman. What does the ordinary Englishman know of "*Electric*" as applied to velveteen? He knows what "*Electric*" is more or less, perhaps rather less than more, and he associates it with electricity—that is what an ordinary person would suppose, rightly or wrongly. I do not think it matters which in the least. This word is not obviously meaningless, and is not in my judgment a fancy word. For these reasons it appears to me both appeals ought to be allowed.

LOPES, L.J.:—

These cases raise very important questions under the *Patents, Designs, and Trade Marks Act* of 1883; and the decision of the

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Court with regard to the two cases must depend upon what the true construction of sect. 64, sub-sect. 1 (*c*), of that Act should be. The words are: "A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use." Therefore with regard to these two cases which are now before the Court, the words which are sought to be registered must be distinctive; they must not be in common use; and they must be fancy words. It is unnecessary to say anything with regard to the word "distinctive." That speaks for itself. With regard to the other expression "not in common use," it is not necessary to express an opinion, having regard to the decision that the Court has arrived at with regard to the term "fancy words." But now I come to the expression "fancy word." It is a difficult thing to define; but it is necessary that the Court should attempt to define what is meant by "fancy word." I adhere to the two definitions I gave of that expression during the course of the argument. I think a word to be a fancy word must be obviously meaningless as applied to the article in question. I think it must be a word fanciful in its application to the article to which it is applied in the sense of being so obviously and notoriously inappropriate as neither to be deceptive nor descriptive, nor calculated to suggest deception or description. Further than that, I think, that the word must have an innate and inherent character of fancifulness which must not depend on evidence, and cannot be supported by evidence to shew that in fact it is neither deceptive nor descriptive, or calculated to be deceptive or descriptive. What I mean is that a fancy word, in my opinion, must speak for itself; it must be a fancy word of its own inherent strength. I do not propose to go into the facts of these cases; they have already been so fully gone into by the other members of the Court; and the cases which are applicable to these cases have been cited. I will only proceed to apply the definition which I venture to lay down to the two cases in question. Applying the definition to the first case of "*Melrose*," as applied to the "*Favourite Hair Restorer*," I consider that word not a fancy word within the meaning of the Act. In my opinion it suggests a description as to the place of origin of the hair restorer, and if it does not, in my opinion it is calculated to mislead the minds of

the ignorant, and lead them to think so. With regard to the other case, the word "*Electric*," which is sought to be registered in connection with velvet and velveteen, to my mind is clearly not a fancy word. In my opinion it is a descriptive word, and if it were not for what was said by the learned Vice-Chancellor, I should say that the case was almost unarguable. I only wish to make one further observation, and it is this:—I do not say that all geographical names are to be excluded from the category of fancy words, nor do I say that any word to be found in a dictionary is *ipso facto* to be disqualified; but I do say that a word to be a fancy word must come within the definition which I have attempted to lay down. I think that both these appeals should be allowed.

Sir *Horace Davey*, Q.C., asked that the Applicants might pay the costs of the appeal, and also those in the Court below.

Aston, Q.C., submitted that their Lordships would, under all the circumstances, not give any costs.

COTTON, L.J.:—I think in these cases, taking them really as test cases brought forward by the Office, it is right, that there should be no costs, but we treat them as exceptional cases, and do not intend in any way to overrule the ordinary practice in these cases.

I think I should correct, with Lord Justice *Lindley's* approval, or his consent, the definition he gave. It should run, not "obviously meaningless," but "obviously not intended to be descriptive."

LINDLEY, L.J.:—Perhaps non-descriptive would be better.

Solicitors: *The Solicitor to the Board of Trade; Watney, Tilleard, & Freeman; C. A. Bannister.*

F. G. A. W.

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Company—Winding-up—Distress for Rent—House in Occupation of Under-tenants—Charge of Debenture-holders—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 163 [*Revised Ed. Statutes, vol. xiv., pp.* 222, 238.]

A company who were the lessees of a house where they carried on their business were ordered to be wound up, being indebted in an arrear of rent to their landlord. A scheme of reconstruction was sanctioned by the Court under which the lease was purchased by a new company; and the new company agreed with the landlord to pay him the arrears of rent and "all subsequent rent accruing due under the lease in manner therein provided," but no assignment of the lease to the new company was ever executed.

The new company issued debentures charging all their property to a much larger amount than the value of the furniture in the house.

The new company was also ordered to be wound up, a year's rent being due to the landlord:—

Held, by *Kay*, J., that the landlord was entitled to distrain on the furniture as against the debenture-holders, and that as it was the only property of the company and the debenture debt was much greater than its value, the official liquidator had no interest in the matter and no power to interfere.

Held, also, that if the debenture-holders were out of the way, the landlord, although he had a claim for the rent under the agreement for which he could prove in the winding-up, could distrain according to *Ex parte Clemence* (1), which, however, was disapproved.

Held, by the Court of Appeal (affirming the decision of *Kay*, J.), that as the charge of the debenture-holders was more than the value of the furniture, the furniture did not belong to the company, and the landlord was therefore entitled to distrain upon it; but the Court gave no opinion on the question whether the landlord could have distrained if the debenture-holders had been out of the way.

Held, also, that the fact that the debenture-holders were willing and offered to release their security and stand as general creditors made no difference in the landlord's right.

Held, also, that under an agreement between the liquidator and the landlord that the liquidator should sell the furniture and pay the proceeds of the sale, "less the auction charges," into Court, the liquidator was not entitled to deduct his own costs and charges in carrying out the sale.

THIS was a motion made in the winding-up of the *New City Constitutional Club Company, Limited*, on behalf of *A. Purssell*, the

(1) 23 Ch. D. 154.

landlord of the house and premises in which the business of the club was carried on, for leave to distrain upon the furniture for rent in arrear, or to re-enter the premises.

On the 28th of July, 1884, a lease was granted by *Purssell* to a joint stock company called the *City Constitutional Club Company*, of the premises in question, which were situate in *Milk Street*, in the city of *London*, for a term of twenty-one years, at a rent of £4000 a year, and the lessees entered into a covenant not to assign without the landlord's consent.

In March, 1885, a petition was presented and an order made for winding-up the *City Constitutional Club Company*, at which time £2500 was owing to the landlord for rent. A scheme of reconstruction was agreed upon and sanctioned by the Court: and the property of the company, including the lease, was purchased by the *New City Constitutional Club Company*. An agreement, dated the 9th of July, 1885, was entered into, to which the landlord was a party, thereby recognising the purchase of the lease; and the new company agreed to pay him the arrears of rent due "and all subsequent rent to accrue due under the lease in manner therein provided." No actual assignment was made of the lease to the new company.

The new company issued debentures to the amount of £5000, which gave the holders a charge upon all their property including the furniture and other chattels. It appeared from the evidence that the charge of the debenture-holders far exceeded the value of the furniture and chattels.

An action was brought by *W. H. Clarke* on behalf of himself and the other debenture-holders, in which he obtained judgment on the 5th of April, 1886, for accounts and inquiries, and a receiver.

On the 1st of April, 1886, a petition was presented for winding-up the company, under which a winding-up order was made on the 17th of April, and on the 21st of April an official liquidator was appointed.

On the 8th of April, 1886, Mr. *Purssell* gave notice of motion in the action, which was afterwards amended so as to be also in the winding-up, that he might be at liberty to distrain on the

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chattels on the premises of the company notwithstanding the appointment of the receiver, and notwithstanding the winding-up order.

On the 21st of April, the day on which the liquidator was appointed, an agreement was entered into between the liquidator, the landlord, and the company, and also the receiver on behalf of the debenture-holders; and it stated that:—"The official liquidator is not willing to carry on the business of the club except the landlord and the debenture-holders will consent to stand on one side and let the loss, if any, on the trading, together with his remuneration for carrying on, be first paid out of the proceeds of the assets, and that he is not to be held personally responsible for rent. The debenture-holders and the landlord concur in this, subject to the following limitations: That this arrangement is to be subject to revision at the end of a fortnight, and that the remuneration of the official liquidator for that purpose is not to exceed £50; that the loss on the trading, if any, shall not be increased by including any charge for rent during the fortnight agreed to."

The official liquidator consented to this arrangement, subject to his being allowed to charge interest at 5 per cent. per annum until the date of repayment upon any sum of money he might have to provide for the purpose of carrying on the business; and also that the scale to be applied in calculating his remuneration during the whole of the winding-up proceedings should not be lower than class 3 referred to in the *Companies Act*, 1862, viz. £3 a day of eight hours, for the time occupied. That agreement was signed by the receiver and by the landlord, and it was afterwards extended until the 20th of May.

On the 13th of May another agreement was made between the official liquidator, the receiver, and the landlord, which was sanctioned by the Court on the 3rd of June, providing that the liquidator should sell the furniture on or before the 5th of June, and should give up possession of the premises to the landlord within a week after the day of sale, and should surrender all his interest in the premises, and should pay the proceeds of the sale, less the auction charges, into Court, the rights of all parties

being reserved. The furniture was accordingly sold and the proceeds paid into Court, and the house was given up to the landlord on the 16th of June.

The motion came on to be heard before Mr. Justice *Kay* on the 8th of July, 1887.

W. Pearson, Q.C., and *Hatfield Green*, for the landlord:—

The 163rd section of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), enacts that "where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." But that has no application to the case of a landlord seeking to distrain, not upon the goods of a company who were his tenants, but upon the goods of a company in liquidation, who were in occupation of the premises and property as under-tenants; and it makes no difference that the landlord has entered into an agreement with the company now in liquidation by virtue of which he could, if he chose, prove in the winding-up for the amount of rent due to him: *Ex parte Clemence* (1); *In re Regent United Service Stores* (2); *Cox* v. *Bishop* (3).

W. Phipson Beale, for debenture-holders.

Hastings, Q.C., and *Micklem*, for the liquidator:—

The decision in *Ex parte Clemence* was merely that the 163rd section of the Act had no application where a landlord was proceeding to distrain upon the goods of a stranger against whose estate he had no right of proof as a creditor under any contract or otherwise. The scope and intent of the section are to prevent landlords from obtaining an advantage over other creditors, in competition with whom they could and ought to prove for their rents. Although the section does not apply where the distraint is against the goods of strangers, yet it does apply to every case in which a landlord has a right of proof against a company in liquidation: *In re Oak Pits Colliery Company* (4); *In re*

(1) 23 Ch. D. 154.
(2) 8 Ch. D. 616.
(3) 8 D. M. & G. 815.
(4) 21 Ch. D. 322.

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Traders' North Staffordshire Carrying Company (1). *Ex parte Clemence* (2), which is relied on by the other side, is unsound, and ought not to be followed.

W. Pearson, in reply, referred to *General Share and Trust Company* v. *Wetley Brick and Pottery Company* (3).

Kay, J., (after stating the facts as set forth above, continued):—

The first question is that which arises as between the landlord and the debenture-holders. It seems to me that the effect of the agreement of the 21st of April, 1886, so far as the debenture-holders are concerned, was only to give certain rights to the official liquidator as against both the debenture-holders and the landlord, and that in no way altered the rights as between the landlord and the debenture-holders. Therefore, I must consider the question as I must have done before the agreement was made, and apart from it, what was the right of the landlord as against the debenture-holders who had taken possession by the receiver? That right, as it seems to me, was unquestionable. The Court would say to the debenture-holders: "The receiver must not interfere with the right of the landlord, who has a right as against you, and any interest you may have under your debentures, to distrain for any rent which is due to him." Then, the company, say: "That may be, but there is no right to distrain as against us." It is, however, in evidence before me on this occasion, and in the affidavits which have been filed on behalf of the company themselves, that the debenture debt is very much more than the proceeds of sale of the chattels and furniture, and that the chattels and furniture are the only property of the company whatever, for it appears also in evidence that the shares are all paid up. The lease is now gone, and is, of course, absolutely valueless as an asset. Practically, when the official liquidator has got all that he may be entitled to have under the agreement, which I have read, as against the landlord, he will have no further interest in the matter whatever. He has no power that I can see to interfere with the landlord's right of

(1) Law Rep. 19 Eq. 60. (2) 23 Ch. D. 154.
(3) 20 Ch. D. 260.

distress as against the debenture-holders. That right is, that when the payments which the liquidator stipulated for in that agreement shall have been made out of the proceeds of those assets, then, as between the liquidator and the debenture-holders and the landlord, the rest of the assets will have to be handed over *in solido* to the debenture-holders, subject to the right of the landlord. The right of the landlord, after satisfying that agreement, will be merely a right as between him and the debenture-holders, and no question between him and the company can possibly arise. But I think the proper thing to do will be to declare, as between the landlord and the debenture-holders, that the landlord had a right to distrain upon the chattels for the amount of the rent due to him on the 25th of March, 1886. And the right for which he asks is leave to distrain. Of course, I must also declare that the right must not interfere with the liquidator in receiving all that he is entitled to receive under the agreement of the 21st of April. Then, if necessary, there must be an inquiry whether anything is due to the liquidator under the agreement, *i.e.*, whether anything is due to the liquidator under the agreement for loss, if any, on the trading, together with his remuneration for carrying on the business of the club.

Let me now consider another point, which is an extremely interesting one, viz., what are the rights, supposing the debenture-holders were out of the way, as between the landlord and the company? There are three sections of the *Companies Act* of 1862 upon this point, which may or may not apply to this case. The 85th provides that: "The Court may, at any time after the presentation of a petition for winding up a company under this Act, and before making an order for winding up the company upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company, upon such terms as the Court thinks fit." The 87th enacts that: "When an order has been made for winding up a company under this Act no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court;" and the 163rd section, reading it shortly, is: "Where any company is being wound up . . . . any attachment, sequestration, distress

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or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." First of all, does the 163rd section apply to this case? Upon that point there is considerable authority. The first case is that of *In re Lundy Granite Company* (1), where the company, being the equitable owners of the lease, continued after the winding-up order in occupation of the land and left goods upon it; and it was decided that neither sect. 87 nor sect. 163 prevented the landlord distraining upon the goods. In that case the landlord had no remedy whatever against the company, who were in possession, for the recovery of his rent, except the right of distress. The rent was not due from the company to the landlord at all. He could not have sued them for it; he could not have treated it as a debt due from the company, and the question to be decided was, as in effect stated in the judgment in that case, "Has the section any application when the landlord is coming to distrain, not for a debt due from the company, but for a debt due from his lessee, who is another and a different person, and the company happen to be in possession?" The Court asked how had the section anything to do with it; and it was held that it had nothing whatever to do with it, and that sect. 163 did not apply. That this was the decision is made all the more clear by the comments of Sir *George Jessel* upon it in the case of *In re Traders' North Staffordshire Carrying Company* (2):—"In that case," said (3) the Master of the Rolls, referring to *In re Lundy Granite Company*, "as in *In re Exhall Coal Mining Company*, (4), the company was not the tenant. The person who was tenant was the person who, I suppose, was a trustee for the company. The company was not the tenant, but was the equitable owner of the lease; the original lessee, or some assignee from him, was the tenant. Now, the landlord distrained after the winding-up order,"—in this case, the landlord applied before the winding-up order, but after what would be the commencement of the winding-up—"not merely after the commencement of the winding-up, and the question was, he having taken the goods of the company, whether the

(1) Law Rep. 6 Ch. 462.
(2) Ibid. 19 Eq. 60.
(3) Law Rep. 19 Eq. 65.
(4) 4 D. J. & S. 377.

distress was valid. The late Master of the Rolls held that it was not valid. There was an appeal from that decision, and the order was reversed, but the judgment of the Lords Justices, as I understand it, takes this distinction, that where the right of the landlord against his own tenant, not being the company, is not the right of a creditor of the company, but is simply the right to take the goods, whosesoever they happen to be, the 163rd section has no application." He goes on to say, however: "Of course there is considerable difficulty in the words," —meaning the words of the section, that is, in deriving that conclusion from the words of the section—"but the meaning that they put upon the section was this, that it must be a distress against the estate or effects of the company as estate or effects of the company—that is, a distress which could not have been validly made in any other character. I do not say that I can find the words in the section; but that is the decision." Then he said: "A reason is given for it which appears to be of considerable cogency, if I may say so with great respect, and that is this, that the meaning of the Act was to ensure equality amongst the creditors, and the creditor whose proceeding was restrained was to come in and prove with the rest; but in the case before their Lordships the landlord was not a creditor at all, and therefore, instead of producing equality, it would have produced inequality, by depriving him of his legal right to a distress, and giving him nothing at all." He continues: "As I read the decision, therefore, it merely amounts to this, that where the landlord is a stranger, but is not a creditor of the company, and where he seizes the goods under his ordinary right of landlord, as being a stranger's goods on the lands of his tenant, the 163rd section does not apply. I must say, it appears to me, although I do not find the words, that the reason, the spirit, and the meaning of the Act are entirely in accordance with the decision of the present Lords Justices in *In re Lundy Granite Company* (1);" and then he adds: "Of course, as I said before, if it were not so, you would destroy the right of the landlord, and you would give him nothing in return." Now the words of Sir *George Jessel* all apply to a case where, for the recovery of the sum for which the land-

(1) Law Rep. 6 Ch. 462.

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lord wants to distrain, he has no other remedy whatever against the company whose goods he wants to take, and no right which would entitle him to prove for the same sum against them. Before I go to another decision, which I will mention presently, I would observe that in the present case that is not so, because by the agreement made on the 9th of July, 1885, between the company and the landlord, it seems that the lease which the landlord had granted to the preceding company (which has since been wound up) was a lease which contained a covenant against assignment without license, and it could not consequently have been assigned over to this company without the license of the landlord. This document, which was executed long before the proceedings for winding up were taken, recited the original lease, and that the original lessees had asked the landlord to allow the rent to remain unpaid for a considerable period. It also recited the petition to wind up the old company (that has nothing to do with this company), and it recited the amount which was due to the landlord for rent. Then there is the recital: "And whereas this company"—that is the present company—"have purchased from the official liquidator of the old company the said lease, and the furniture, fittings, and all other the interest of the official liquidator in the said hereditaments, and the club carried on there, subject to the payment of the last-mentioned sum; and whereas it has been agreed that the proceedings on the part of the lessor shall be stayed on the terms thereinafter mentioned." Then it was agreed that the present company should pay to the lessor the arrears of the rent (which are mentioned), and should pay all subsequent rent accruing due under the lease in manner therein provided, that is, in the manner provided by the agreement. Perhaps that does not amount formally to an attornment; but, at any rate, it amounts to a very clear contract by this company that they would pay to the landlord all rent subsequently accruing due. For ample consideration, as is obvious on the face of it, the landlord allowed or sanctioned the purchase which the new company had made; that is, he consented to the assignment to them, and allowed them to continue in possession of this property of his on the footing of their having purchased it from the official liquidator of the old company. That, as I have

said, they could not have done without his sanction, so that there can be no doubt for rent accruing due after that time the landlord would have a right of proof against this company. Of course, *cessante ratione legis, cessat ipsa lex.* According to the words which I have read of the late Master of the Rolls, the whole ground of the decision in *In re Lundy Granite Company* (1) was that they could not take away from the landlord his right of distress against the goods of a stranger who had entered into possession of property which had been let to somebody else, when he had no right of proof against the stranger, that stranger being a company which was being wound up. That is intelligible enough; but where he has that right of proof how does that apply? As I understand the rule, the reason of it is this, that the landlord, where he is applying to have a right of distress for rent which has accrued due and become payable before the winding-up, is always answered by saying, "No; in respect of that rent you stand simply in the position of every other creditor of the company, and you cannot use your power of distress to obtain an advantage over the other creditors. You must come in and prove, and take your dividend *pari passu* with them." If the landlord had that right of proof, surely the reason for allowing him to come in and distrain does not exist. But then, if sect. 163 does not apply at all, then, of course, the landlord's right to distrain is not estopped by the winding-up order; and if sect. 87 does not apply before that time it does not apply at all, and then his right of distress is not interfered with, and the Court has no right to stop him. But is that the construction which the Court of Appeal has put upon the statute? It seems to me, from the late Master of the Rolls' comments upon their language, that that is not the construction. They only said that the sections do not apply where the landlord has no right of proof against the company which is being wound up. However, I find a decision which I am not able to reconcile with that authority. In the case of *Ex parte Clemence* (2), where most certainly that state of things did not exist, the landlord was allowed to distrain although he had a right of proof against the company. The facts were, that there being an arrear of rent due to

(1) Law Rep. 6 Ch. 462. (2) 23 Ch. D. 154.

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the landlord, the company, who were not tenants of the landlord, but were undertenants of his lessee, having taken possession of the property, gave to the landlord for the overdue rent a promissory note. The landlord could, therefore, have proved upon the promissory note in the winding-up. But, notwithstanding that the landlord could have proved, I find that the learned Judge before whom that case came, said that the Court could not deprive the landlord of his right to distrain. He said (1): "If I were to deprive him of his right of distress as a landlord against the goods of third persons because he has a collateral right against the company, I think I should be doing that which is inequitable." With very great deference, I do not follow that reasoning at all. Why would it be so if the Court has the power to do it? The rule is, that the landlord shall not obtain an advantage over other creditors in competition with whom he can come in and prove; and, if I understand the facts of that case, the landlord could have come in and proved for this very rent upon the promissory note in competition with the other creditors. If the Court has any power in this matter, I cannot see how it was inequitable to prevent the landlord from proving. However, I must treat this authority as being binding upon me, and although the landlord has here an agreement with the company that they shall pay to him the rent, which was not due from them as rent, and although he might, of course, have come in and proved under the agreement, still he is not to be deprived of his right of distress, although under the right he takes goods which did not belong to his original lessee at all, but to this company. So much for the authorities, and there is another reason here, as I have stated, why this company cannot interfere with the landlord's right, and I must accordingly make the declaration which I have already stated, and give liberty to apply. I shall direct an inquiry to ascertain the amount payable to the official liquidator, and order that that amount be paid to him, and then that the rest of the money in Court be paid out to the landlord. I understand that the rent in arrear greatly exceeds the amount in Court. It is double the £2000. The order will be in that form; but, if the parties can agree, they need not take the inquiry.

(1) 23 Ch. D. 157.

1886. July 22. *Micklem* (*Hastings*, Q.C., with him), for the liquidator, moved to vary the minutes of the order, so that the liquidator might be allowed his costs in and about the realization of the furniture, fittings, and articles on the demised premises, sold by him under the agreement dated the 13th of May, 1886.

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W. Pearson, Q.C., and *Hatfield Green*, for the landlord, opposed the application.

Micklem, in reply.

KAY, J. (stated the facts of the case in connection with the point, and continued):—

Before the landlord's motion for liberty to distrain came on for hearing an agreement dated the 13th of May, 1886, had been entered into, under which the liquidator was to sell the furniture on or before the 5th of June, and to give possession within a week from the day of sale, and to surrender all his interest in the premises, and to pay the proceeds of sale, less the auction charges, to the landlord. The landlord's motion came on upon the 1st of July, and not a word was said about the liquidator having anything more than the agreement itself gave him.

Accordingly, the liquidator did have what the agreement gave him, and nothing else.

Now, the matter is brought before me on motion to vary the minutes of the order. The case has been re-argued in order to obtain something for the liquidator which he did not ask for before, and which, if he had asked for, it would have been immediately refused. The application would have been decided against him, as I now decide it, because the landlord was to have, against the liquidator, the same rights concerning the proceeds of sale, less only the auction charges, as he then had concerning the chattels themselves. Accordingly, the motion seems to me entirely wrong; and I must dismiss it with costs.

T. F. M.

From this decision the official liquidator appealed. On the hearing of the appeal it appeared that the majority of the deben-

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ture-holders had offered to release all their charges on the property of the company and to rank as ordinary creditors of the company.

The appeal came on for hearing on the 28th of January, 1887.

Hastings, Q.C., and *Micklem*, for the Appellant:—

The furniture is really the property of the company notwithstanding the charge of the debenture-holders, even if their charge is valid. But the majority of them have consented to release their charge, and it ought therefore to be considered as a disputed debt and removed out of the way, and the question is only between the landlord and the company.

Ex parte Clemence (1), which was relied upon on behalf of the landlord in the Court below and which has never been affirmed by the Court of Appeal, was decided upon a mistaken principle, and is contrary to a long line of decisions, from *In re Lundy Granite Company* (2) down to *In re Oak Pits Colliery Company* (3), where the authorities are summed up by *Lindley*, L.J. In any case if the landlord is a legal creditor of the company for rent in arrear at the commencement of the winding-up, then under sect. 163 he loses his right to distrain for such arrears, and must prove his debt like any other creditor.

In this case the relationship of landlord and tenant between *Purssell* and the company was constituted by the agreement of the 9th of July, 1885, into which must be read as incorporated the clauses in the original lease as to the payment of rent, and this relationship is recognised in the agreement of the 21st of April, 1886. *Purssell* having contracted to accept the company as his tenants cannot, in the face of the clause of the agreement as to subsequent rent, contend that he has a right to distrain because the relationship of landlord and tenant does not subsist between him and the company. And the only way in which he can get out of the grasp of the 163rd section is by shewing that he had no right to prove against the company: *In re Traders' North Staffordshire Carrying Company* (4).

We also complain of the judgment of Mr. Justice *Kay*, for

(1) 23 Ch. D. 154.
(2) Law Rep. 6 Ch. 462.
(3) 21 Ch. D. 322.
(4) Law Rep. 19 Eq. 60.

refusing the liquidator his costs and expenses of selling the property. It is true that the agreement of the 13th of May, 1886, only refers to the "auction charges," but it is the duty of the liquidator to realize the assets, and his expenses in so doing are a prior charge on the assets to any other: *In re Marine Mansions Company* (1).

[COTTON, L.J., referred to *In re Regent's Canal Ironworks Company* (2).]

W. Phipson Beale, for the debenture-holders, repeated the offer of the majority of them to release their security.

W. Pearson, Q.C., *Buckley*, Q.C., and *Hatfield Green*, for the landlord, were only called on with respect to the costs and expenses of the liquidator:—

The matter is concluded by the words of the agreement of the 13th of May, 1886. The landlord claimed the right to distrain on the furniture, and if he had distrained he would have had to pay no costs except the auction charges. It is intended by the agreement to put him in the same position as if he had distrained.

Hastings, in reply.

COTTON, L.J.:—

This is an appeal from an order of Mr. Justice *Kay* made on the application of the landlord of a house occupied by the company in liquidation, for liberty to distrain on the furniture and other chattels in the house notwithstanding the winding-up of the company. Mr. Justice *Kay* made the order on the assumption that the chattels were the property of the debenture-holders, and that the extent of their charge being greater than the value of the chattels, the company and the shareholders were prevented from having any property in them, and his Lordship accordingly held that the landlord was entitled to distrain for the arrears of rent due at the commencement of the winding-up, and ordered the balance of the money in Court, after satisfying the landlord, to be paid to the debenture-holders. From that order the official liquidator has appealed, relying on the 163rd section of the

(1) Law Rep. 4 Eq. 601. (2) 3 Ch. D. 411.

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Companies Act, 1862. The winding-up of the company dates from the 1st of April, 1886, and was therefore before this application was made; but the question is, Is the case within the terms of the section? Were these chattels, within the meaning of that section, the effects of the company so as to make the order of Mr. Justice *Kay* wrong?

The circumstances were as follows: The debenture-holders had a charge upon the property exceeding the value of the property, and they had asserted their rights and had brought an action to enforce them, in which they had obtained a receiver. That being so, the appointment of the receiver would prevent the landlord from levying a distress without the leave of the Court, and therefore he gave notice of an application to the Court in the action for leave to distrain. The notice of motion was amended by adding a notice of motion in the winding-up, but the motion was not brought on to be heard because there was a negotiation going on between the parties for arranging the matter. On the 21st of April, 1886, an agreement was entered into that the business should be carried on by the liquidator, and that the landlord's claim for rent should not be increased. Then, on the 13th of May, a further agreement was made that the goods should be sold by the liquidator, and the money brought into Court, and the landlord was to have the same claim on it as he had on the goods. This agreement was sanctioned by the Court, and the goods have been sold accordingly. The application by the landlord was heard on the 7th of July, and the order appealed from was then made. It is contended that the Judge was wrong in holding that the goods were not at the time the property of the company; and this point was raised, that the liquidator disputes the claim of the debenture-holders, and therefore their charge ought not to be considered; and if they are excluded there is no charge on the goods, and they are the property of the company. But there is nothing to shew that the claim of the debenture-holders is not valid. The affidavit of the liquidator treats them as a valid charge. No evidence has been brought before us to prove that they were invalid. We must therefore treat them as valid, and as being a subsisting charge on the property. But then this extraordinary thing has happened:

the debenture-holders, or the majority of them, now say that they are willing to give up their security. They do not give up their claim against the company, but only offer to give up their security. Is that enough to affect the rights of the landlord? There is no affidavit that the debentures are invalid; there is no honest dispute as to their validity, but after the order had been made by Mr. Justice *Kay* they voluntarily offer to give up their security to the official liquidator with a view to defeat Mr. Justice *Kay's* order. I am of opinion that that does not alter the position of the parties, but that it remains the same as it was at the commencement of the winding-up. What, then, were their rights at that time? I am of opinion that according to the true construction of the 163rd section of the *Companies Act*, 1862, having regard also to the 87th section, if the charge on property in the occupation of the company exhausts its whole value, it is not to be considered as property of the company within the meaning of the 163rd section. In the present case the agreement between the parties provided that the rights of all parties should be reserved. In my opinion, at the date of the commencement of the winding-up, and of this agreement, on the equitable construction of the 163rd section, Mr. Justice *Kay* was right in holding that as against the debenture-holders the landlord had a right to distrain on the furniture and chattels, and therefore that he has a right to the proceeds of the sale of the property.

But the learned Judge went further: he held that as between the company and the landlord, the landlord had a right to distrain; but said that he would have come to a different conclusion if it had not been for the case decided by Lord Justice *Fry* in *Ex parte Clemence* (1). We need not enter into the question whether Lord Justice *Fry* was right in that decision. It must not be taken that we approve of that decision, but we leave it to be dealt with when the occasion shall arise. But as to the main point, namely, the right of the landlord as against the debenture-holders, the appeal fails.

Another point has been raised on the agreement that the furniture should be sold and the proceeds brought into Court after deducting the auctioneer's charges. All that the liquidator was

(1) 23 Ch. D. 154.

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authorized to deduct was the auction charges, but the liquidator claims to deduct something more. The liquidator claims to deduct the expenses of himself and his clerk, and various other parties. These the learned Judge refused to allow, and in my opinion he was right. Therefore, the appeal on that point also fails.

Lindley, L.J. :—

I am of the same opinion. The goods in question were in one sense the goods of the company. But when we look at the facts of the case, it is clear that they were mortgaged to the debenture-holders for more than their value. Therefore, for all practical purposes, they were not the goods of the company. Consequently, as between the landlord and the debenture-holders the landlord is entitled to distrain. That is the main question on this appeal.

The other point is an important one, namely, whether the goods were subject to the distress if the debenture-holders were excluded : but it is not necessary to decide that question. Therefore I express no opinion as to *Ex parte Clemence* (1).

With respect to the costs and expenses claimed by the liquidator, I had at first some doubt; but on consideration I think Mr. Justice *Kay* was right.

Lopes, L.J. :—

I agree, and desire to add nothing.

Solicitors : *Davidson & Morriss ; May, Sykes & Batten ; V. Ind Chamberlain.*

(1) 23 Ch. D. 154.

M. W.

In re NICHOLSON (A PERSON OF UNSOUND MIND).

C. A. 1887 Jan. 31.

Trustee Act, 1850, *s.* 3 [*Revised Ed. Statutes, vol. x., p.* 983]—*Mortgagee of unsound Mind—Appointment of Person to convey—Transfer of Mortgage.*

Where a person of unsound mind is possessed of an estate by way of mortgage, the Court can, under the *Trustee Act*, 1850, s. 3, appoint a person to convey the estate for the purpose of effectuating a transfer of the mortgage.

ON the 24th of January, 1865, a mortgage by demise for £400 was transferred to *D. Nicholson.*

On the 12th of February, 1883, an order under the *Lunacy Regulation Act*, 1862, was made, by which, it appearing that *D. Nicholson* was of unsound mind and incapable of managing her affairs, and that her income did not exceed £50, *John Porter* was authorized to receive and give a discharge for the interest on the mortgage until further order. £70 a year was allowed for maintenance, and the deficiency of the income was to be made up by sale from time to time of portions of a sum of Consols. The Consols having been exhausted, it was proposed to have the £400 brought into Court, invested in Consols, and treated in the same manner.

The mortgagors had found a person willing to take a transfer of the mortgage, and this petition, presented by *D. Nicholson*, by *John Porter*, as her next friend, and by *John Porter*, asked that he might be appointed, on payment of the £400 into Court, to convey the mortgaged property to the mortgagors, or to the transferees by their direction, for all the estate and interest therein of *D. Nicholson.*

H. F. Shebbeare, for the Petitioner.

COTTON, L.J.:—

Doubts were at one time entertained whether sect. 3 of the *Trustee Act*, 1850, authorized the appointing a person to transfer a mortgage vested in a person of unsound mind, but in my

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opinion those doubts have been removed, and the practice is settled. In my opinion the order may be made.

Lindley, L.J.:—

I also think that the practice is now settled.

Solicitors: *Johnston, Harrison & Powell*, for *Arnison & Co., Penrith.*

H. C. J.

C. A. 1887 *Feb.* 2.

In re CROSLEY. MUNNS *v.* BURN.

[1886 C. 2053.]

Practice—Leave to appeal after Time—Amendment of Notice of Appeal—Informal Notice given within Time—Rules of Supreme Court, 1883, *Order* LVIII., *rr.* 2, 3, 15.

Within twenty-one days from the date of an order allowing a creditor's claim in an administration action the Defendant gave a four-day notice of appeal. After the time for appealing had expired the Respondent wrote to say that the notice was bad, as it ought to have been a fourteen days' notice. The Appellant thereupon gave notice of motion for leave to amend his notice of appeal by substituting the fourteen days' period for that of four. At this time more than fourteen days from the service of the notice of appeal had passed:—

Held, that the notice of appeal was bad, for that it ought to have been a fourteen days' notice, and that leave to amend it in the way proposed ought not to be given after the fourteen days, but that as the applicant had given a distinct notice of appeal in proper time, the time for appealing ought to be extended.

THIS was an original motion for leave to amend a notice of appeal. The action was an administration action in which an account of debts had been directed. Captain *Ayscough* sent in a claim as a creditor, and was required by the Defendant to prove it. The claim was disputed on several grounds, but on the 5th of November, 1886, Vice-Chancellor *Bacon* made an order allowing it at £1156 5*s*. On the 23rd of November, the Defendant, the executor, served on the claimant a notice of appeal, which stated that the Court of Appeal would be moved on Saturday the 27th of November, or so soon thereafter as counsel

could be heard, that the order might be reversed, and that the Court would direct the claim not to be admitted. On the 17th of January, 1887, the Respondent's solicitor wrote to the Appellant's solicitor stating that they had been advised that the notice was bad, as it ought to have been a fourteen days' notice, and ending: "We presume, therefore, that you will not prosecute the appeal." On the 29th of January the Appellant gave notice of motion in the Court of Appeal for leave to amend his notice of appeal by substituting for the date the 27th of November, 1886, the date of the 7th of December, 1886.

A. Young, for the application:—

In *Taylor's Case* (1), where a notice of appeal had been given in time and withdrawn after the time for appealing had expired, under the impression that it was irregular, and a fresh notice was served on the next day, it was held that the time for appealing ought to be extended. In *Little's Case* (2), a notice of appeal was held sufficient, though no time was mentioned in it. In the case of *In re Stockton Iron Furnace Company* (3) it was laid down that the Court could under Order LVIII., rule 3, of the Orders of 1875 authorize the amendment of a notice of appeal, and that special circumstances were not necessary. The present Order LVIII., rule 2, is the same. In the case of *In re Blyth & Young* (4) it was held that a Respondent who intends to object to an appeal being heard is bound to communicate his intention to the Appellant, so as to prevent the incurring of expense, and the difference between an informal notice of appeal and a mere expression of an intention to appeal is dwelt upon. We ask that it may be decided that the notice of appeal was a proper one, or, if not, that the time for appealing may be extended.

[*In re Coulton* (5) was also referred to.]

Ince, Q.C., and *St. John Clerke*, *contrà*:—

This is a final order requiring fourteen days' notice, and the notice is bad: *In re Compton* (6). The Appellant here does not shew any circumstances raising an equity against the Respondent,

(1) 8 Ch. D. 643.
(2) 8 Ch. D. 806.
(3) 10 Ch. D. 335.
(4) 13 Ch. D. 416.
(5) *Ante*, p. 22.
(6) 27 Ch. D. 392.

C.A. 1887

In re CROSLEY. MUNNS *v.* BURN.

and the tendency of late years has been to be very strict as to the time for appealing: *Curtis* v. *Sheffield* (1). The Appellant gave us a notice which was no notice at all.

[COTTON, L.J.:—My present impression is that it was a notice on which you were not bound to appear, but it gave you full notice of the intention to appeal.]

No ground is alleged which makes the slip excusable. At the time when *In re Stockton Iron Furnace Company* (2) was decided, the rules were new, and a slip in construing them was natural, but the construction of the rules is now settled. *Little's Case* (3) would hardly be followed after *In re New Callao* (4). *Collins* v. *Vestry of Paddington* (5) shews the strictness of the Court as to time. *Taylor's Case* (6) is quite different from the present case. A good notice of appeal had there been given in time. In *Craig* v. *Phillips* (7) extension of time was refused though a similar decision had been reversed on appeal. *Krehl* v. *Burrell* (8) is against extension. The time will not be extended unless there is conduct on the part of the Respondent to raise an equity against him: *Rhodes* v. *Jenkins* (9); the Respondent having a legal right to insist on the time: *Ex parte Saffery* (10).

A. Young, in reply:—

No case is cited on the other side where, after a notice has been given within the time, the appeal has not been allowed to proceed. *Williams* v. *De Boinville* (11) agrees with *Little's Case*, and was followed in *In re Coulton* (12).

COTTON, L.J.:—

This is an application for leave to amend a four-day notice of appeal served in November last. The notice was wrong, it ought to have been a fourteen days' notice, for this was a final not an interlocutory order. The Appellant served a notice of which, though wrong in form, the Respondent could have laid hold, and asked for the appeal to be dismissed with costs if the Appellant

(1) 21 Ch. D. 1, 5.
(2) 10 Ch. D. 335.
(3) 8 Ch. D. 806.
(4) 22 Ch. D. 484.
(5) 5 Q. B. D. 368.
(6) 8 Ch. D. 643.
(7) 7 Ch. D. 249.
(8) 10 Ch. D. 420.
(9) 7 Ch. D. 711.
(10) 5 Ch. D. 365.
(11) 17 Q. B. D. 180.
(12) *Ante*, p. 22.

did not appear, and on which, if the Respondent did appear, the Appellant could obtain relief. That the Respondent did not give notice to the Appellant of the objection to the form of the notice till after the time for appealing had expired, does not in my opinion give the Appellant any equity. It was not the Respondent's business to set the Appellant right in his course of procedure.

We have power to allow an amendment of the notice of appeal, but I do not think that this would be the proper course. There would be an absurdity in treating the notice as saying that the Court would be moved on a day which is now long past. If the application had been made before the fourteen days had expired the case would stand very differently.

We think it right, however, to treat the application as one to extend the time for appealing. Many cases have been cited which shew that the Court is very strict in requiring appeals to be presented in time. But in the present case we think that leave to appeal after time ought to be granted. A formal notice of appeal was given in due time, and, though it was not in the proper form, the Court could have acted upon it if the Respondent had appeared, and this disposes of the cases relied on by Mr. *Ince*. We allow a fresh notice of appeal to be given, but it must be served to-day, and the Appellant must pay the costs of this application and any other costs the Respondent has been put to by reason of the irregularity.

LINDLEY, L.J.:—

I agree, and think that it would not be right to exclude the Appellant from reviewing the decision of which he complains. My reason is that within the twenty-one days he gave a distinct notice of appeal, on which he might have obtained all he wanted if the Respondent had appeared upon it.

LOPES, L.J.:—

I also am of opinion that under the circumstances of this case the Appellant ought not to be shut out from appealing.

Solicitors for Appellant: *John Holmes & Son.*
Solicitors for Respondent: *Leathley & Phipson.*

H. C. J.

C. A.
1887
Feb. 2.

BRAY *v.* GARDNER.

[1885 B. 3978.]

Patent—Disclaimer pending Action for Infringement—Terms of giving Leave to amend by Disclaimer—Patents, Designs and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 19.

Where the Plaintiff in an action for infringement of a patent asks for leave to apply at the Patent Office to amend his specification by way of disclaimer, the Court will as a general rule impose the condition that the amended specification shall not be receivable in evidence in the action, though in particular cases less stringent terms may be imposed.

THIS was an action for infringement of several patents for improvements in rivets and lacing studs, and machinery for manufacturing them. Pending the action the Plaintiff, on the 13th of December, 1886, gave notice of motion for liberty to apply to the Patent Office for leave to amend the specification of one of his patents by striking out the first claim, and that of another by striking out the first four claims, and by making in each case all consequential amendments.

The motion was heard by Mr. Justice *Stirling*, who on the 16th of December made an order that the Plaintiff should be at liberty to apply to the Patent Office for leave to amend his specification, on which his letters patent of the 12th of February, 1879, were granted, and his specification on which his letters patent of the 9th of June, 1880, were granted, by way of disclaimer, "providing that the specification as amended shall not be receivable in evidence in this action." This was the form adopted in *Singer* v. *Stassen* (1). The Plaintiff appealed, and the appeal was heard on the 2nd of February, 1887.

Moulton, Q.C., and *A. àB. Terrell*, for the Appellant:—

The application to amend is made under sect. 19 of the *Patents, Designs and Trade Marks Act*, 1883, which empowers the Court to give the leave subject to such terms as to costs and otherwise as the Court or a Judge may impose. The question is, what terms ought to be imposed. The Judge has followed the order in *Singer*

(1) 1 Rep. Pat. Cas. 121.

v. *Stassen* (1), and if that case is treated as establishing a general rule we are out of Court. But we submit that it was not intended in that case to lay down a rule applicable to all cases. Such a rule would substantially repeal sect. 20 of the Act, and amendment under it would put a plaintiff in a worse position—he had better dismiss his action and have his hands free, for the only terms ever imposed by the law officer are that the patentee shall not bring any action for breaches committed before the date of the amendment. The condition which has been imposed takes away all the benefit of the action. The close of sect. 19 shews that it was contemplated that the action should go on, and the amended specification be received in evidence. Sect. 20 helps our case.

[COTTON, L.J.:—May not that section refer to a case where the Court is satisfied that the patent was good without disclaimer?]

That cannot be its meaning, if it had been it would have said "that his original claim was valid," whereas what it says is, "that his original claim was framed in good faith and with reasonable skill and knowledge." The section was intended to modify the rule that no damages could be recovered for acts done while the patent was invalid. Leave should be given on terms which are fair as between the plaintiff and defendant, and terms ought not to be imposed which make the power to apply to the Court nugatory. Sect. 39 of the *Patent Law Amendment Act*, 1852 (15 & 16 Vict. c. 83), which precluded a patentee whose patent had been amended from bringing any action in respect of breaches before the amendment unless the law officer certified that such action might be brought, has been repealed.

[COTTON, L.J.:—Can you by amendment of your patent give yourself a right of action which you had not when you commenced your action? *Perry* v. *Skinner* (2) appears to be against you.]

Reg. v. *Mill* (3) is the other way, and an analogy in our favour is furnished by *Quilter* v. *Mapleson* (4), where in a pending action a party was held entitled to enforce a right which he only acquired by an Act passed during the pendency of the action.

Aston, Q.C., and *Carpmael, contrâ*, were not called upon.

(1) 1 Rep. Pat. Cas. 121.
(2) 2 M. & W. 471.
(3) 10 C. B. 379.
(4) 9 Q. B. D. 672.

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COTTON, L.J.:—

This is an appeal by the Plaintiff from an order allowing him to apply to the proper authority for leave to amend the specifications of two of his patents, on terms which he alleges to be too hard. What he principally complains of is that the Judge imposed upon him the condition that the specifications as amended shall not be receivable as evidence in this action. This was an order within the discretion of the Judge, exercised in the particular case, and no reason has been shewn applicable particularly to this case why this form of order should not be made. Sect. 19 of the *Patents, Designs and Trade Marks Act*, 1883, provides that in an action for infringement of a patent "the Court or a Judge may at any time order that the patentee shall, subject to such terms as to costs and otherwise as the Court or a Judge may impose, be at liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer, and may direct that in the meantime the trial or hearing of the action shall be postponed." That, I think, assumes that there may be cases where it would be right that the amended specification should be given in evidence, but it is not suggested that in this case there are any special grounds for allowing it. We do not decide in dismissing this appeal that in no case ought the amended specification to be allowed to be given in evidence. It must depend on circumstances what are to be the terms imposed by the Judge. But, in my opinion, as a general rule, the terms of the present order are the right terms. By applying to amend the specification under ordinary circumstances the patentee admits that the specification for some reason or other, either by reason of its claiming too much, or not sufficiently describing the invention, does not comply with the conditions imposed on a person taking out letters patent, and that if the action went on without the amendment there would be a defence open to the defendant in the particular action on the ground that at the time the action was brought there was no valid patent. In my opinion it would be wrong, the matter being within the discretion of the Court, to allow a plaintiff by amending a specification to get all the advantages of that amendment as against the defendant in the action. It would be giving him, after he had originally come to the Court with a patent which

could not be relied on, power to put himself in a different position as against the defendant. Even if the consequence of amendment may be that the patentee is entitled to maintain his action in respect of previous acts which are infringements of the patent as amended, in my opinion discretion is given to the Court to say "You may amend if you like pending this action, but one of the terms will be that you shall not give the amended specification in evidence to enable you to sue on a patent which at the time when you commenced your action you could not sue on at all." What benefit, then, is to be gained by obtaining liberty to apply for leave to amend? There may be a very great benefit to a patentee. There may be other persons not parties to the action who are acting in reliance on the defects in the plaintiff's specification, and as against them it may be most material for him at once to get the defect remedied, and from that time to be enabled to sue those parties. That I think will shew that there would be ample ground for a patentee's applying pending an action for liberty to apply for leave to amend, even although these terms are imposed upon him. Speaking for myself, I think it very well to teach patentees to be more careful in framing their specifications. We have lately had before this Court specifications framed with considerable carelessness, and in my opinion it would be a good check upon patentees to say: "If you ask for liberty to amend by disclaimer pending an action you are not to make use of that amendment as against the defendant whom you brought here when your specification was in such a state that you could not successfully continue your action if it was not altered." The matter is not entirely new, it has already been before the Court of Appeal in *Singer* v. *Stassen* (1), where the Master of the Rolls and the Lords Justices *Bowen* and *Fry* had to consider a case very like this, with one distinction, that in that case the action had been commenced before the Act of 1883 came into operation, whereas here though the patents were granted before the Act came into operation the action has been commenced since. The great point there was whether sect. 19 of the Act applied where the action had been commenced before the Act came into operation. The Court decided that it did, and

(1) 1 Rep. Pat. Cas. 121.

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that they had power given to them by sect. 19 to allow an application to the proper authority for amendment. Then came the question what ought to be done as regards the defendant? How was he to be protected? It was urged on behalf of the patentee that sect. 113 gave a sufficient protection to the defendant in an action pending when the Act came into operation, but the Court said in substance, "That may be so, but the question is one of difficulty, and we will give him protection independently of that section;" and therefore they imposed the same terms on the patentee as have been imposed upon the present Plaintiff. When once it was established that the Act applied to pending actions the question was the same as we have here, and although, as I say, we do not decide that in all cases these are the proper terms, yet, in my opinion, under ordinary circumstances, and as a general rule, these terms are properly imposed upon a patentee desiring to disclaim pending an action. Therefore the appeal fails.

LINDLEY, L.J.:—

I am of the same opinion. What we are asked to do by the appeal motion is to strike out of the order made by Mr. Justice *Stirling* the provision that the amended specifications may not be given in evidence in this action. Mr. *Moulton* has opened the case upon general principles without reference to the circumstances of this particular case, and what the special circumstances of this case are, we do not know. He has told us in answer to a question from the Court, that what the patentee wants to do is to amend by disclaiming some parts of the claims in two of his specifications, which are really important, and his asking for liberty to apply for leave to do so is like an admission that unless that disclaimer is made this action must fail. Now there may be great differences in the importance of what is disclaimed, and I can conceive circumstances in which the Court might think it unnecessary to impose such stringent terms as have been imposed in the present case. The last words of sect. 19, to which Lord Justice *Cotton* has referred, seem to indicate that there may be cases in which it will be just to let the action go on and to allow the amended specification to be given in evidence

for some purpose, although I am not at this moment prepared to say for what purpose. But we do not know the circumstances, no special case is made, and all that I am desirous of adding upon this part of the case is this, that I do not consider that there is any form of order which is invariably to be followed in all cases when application is made under sect. 19. It appears to me that whenever liberty is given under that section care ought to be taken that no injustice is done to the defendant by reason of the amendment. Adequate protection may be given to the defendant in various cases in various forms, but in this case, not knowing anything at all about the special circumstances, I am not prepared to say that the terms imposed by Mr. Justice *Stirling* are wrong.

When the 19th section is carefully looked at, its object is obvious. It has been pointed out by the Master of the Rolls and Lord Justice *Bowen*, in *Singer* v. *Stassen* (1), that sect. 18 of the Act of 1883 gives the existing right of disclaimer, and sub-sect. 10 enacts as follows: "the foregoing provisions of this section do not apply when and so long as any action for infringement or other legal proceeding in relation to a patent" is pending. Litigation as to a patent, therefore, altogether stops the application of sect. 18. Then comes sect. 19, which is in the nature of a proviso to sect. 18, sub-sect. 10, and it says that if litigation is going on the Court may grant the patentee liberty to apply at the Patent Office for leave to amend, upon such terms as to costs and otherwise as the Court may impose. That is a great boon to patentees, because as regards everybody except the defendant in the particular action, the patentee is at liberty to amend his patent and to obtain all advantages to which that amendment may entitle him. Then it is the Judge's duty to see that while granting that benefit to the patentee he does no injustice to the defendant. As I said before, the method of preventing injustice to the defendant would be different in different cases. In *Singer* v. *Stassen* the Court thought that under the circumstances of that case, the proper terms were that the amended specification should not be given in evidence at all in the pending action. The same terms

(1) 1 Rep. Pat. Cas. 121.

C. A. 1887 BRAY v. GARDNER.

have been imposed by Mr. Justice *Stirling* here, and considering the little we know about the special circumstances of this case, I am not prepared to say that he was wrong; on the contrary, having regard to the short but very pregnant admission of Mr. *Moulton*, it strikes me that these terms are probably the only terms that would be right.

I think the appeal ought to be dismissed with costs.

LOPES, L.J.:—

I think that the order of Mr. Justice *Stirling*, under the circumstances of this case, was right. I wish to guard against its being supposed that a similar order must be made in all cases. The words at the end of sect. 19 of the *Patents Act*, which are these, "and may direct that in the meantime the trial or hearing of the action shall be postponed," make it clear to my mind that there may be cases where the Court in its discretion might and ought to allow the amended specification to be given in evidence in the action then pending. I think the appeal should be dismissed with costs.

Solicitors for Plaintiff: *T. & H. R. Gill.*
Solicitors for Defendants: *Wilson, Bristows, & Carpmael.*

H. C. J.

C. A.
1887
Jan. 29, 31;
Feb. 1, 3.

In re CORSELLIS.
LAWTON *v.* ELWES.

[1881 C. 5526.]

Solicitor—Trustee—Profit Costs—Acting for other Trustees—Preparing Leases—Fees of Steward of Manor.

E., a partner in a firm of country solicitors, was one of two trustees of a will which contained no power to charge for professional services.

E. and his co-trustee were Respondents to an application for maintenance by a next friend on behalf of an infant under the summary procedure of the Court, and *E.*'s firm, through their *London* agents, acted as solicitors for *E.* and his co-trustee and made profit costs:—

Held, that *E.*'s firm were entitled to receive those profit costs as coming within the exception laid down in *Cradock* v. *Piper* (1). Although that case has been often disapproved, it has been so long acted on as a binding authority that it ought not now to be overruled. The exception applies not only to proceedings in a hostile suit, but to friendly proceedings in Chambers, such as an application for maintenance of an infant.

After the death of *E.*'s co-trustee, *E.* was made Defendant to an administration action in which a receiver was appointed, and *E.*'s firm, through their *London* agents, acted for the receiver and made profit costs:—

Held, that these profit costs could not be retained by the firm; on the principle that a trustee must not place himself in a position in which his interest conflicts with his duty.

E. and his firm made profit costs by preparing leases and agreements for leases of portions of the trust estate, which costs were paid by the lessees:—

Held, that although the costs were paid by the lessees, the solicitors were employed on behalf of the trust estate, and that *E.* and his firm must account to the estate for the costs.

E. and his co-trustee appointed *E.*'s partner steward of a manor which formed part of the trust estate, and fees for manorial business were paid to the steward by the tenants and brought into the partnership accounts:—

Held, that the fees, not being received by the steward in his character of solicitor, were not liable to be accounted for to the trust estate.

THIS was an appeal from a decision of Mr. Justice *Kay* (2).

The facts are fully given in the previous report and may be shortly stated as follows:—The Defendant, *H. H. Elwes* and *H. Firmin* were trustees of the will of *N. C. Corsellis*, the testator in the present proceedings. The will contained no power

(1) 1 Mac. & G. 664. (2) 33 Ch. D. 160.

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In re CORSELLIS. LAWTON *v.* ELWES.

authorizing a trustee who was a solicitor to make charges for professional services.

Elwes carried on the profession of a solicitor at *Colchester* in partnership with *G. B. Turner*.

In August, 1881, before the present action was commenced, an application for maintenance out of the rents and profits of the real estates of the testator was made in Chambers by the next friend of the infant tenant for life. *Firmin* and *Elwes* as trustees were Respondents to the application, and the Defendant's firm at *Colchester* acted through their *London* agents as solicitors for the Defendant and his co-trustee in the proceedings. The profit costs received by the Defendant's firm in respect of this application amounted to £16 9*s.* 2*d.*, and the Defendant claimed to be entitled to a share therein.

Part of the testator's estate consisted of the manor of *Wivenhoe*, the steward of which at the death of the testator was *N. C. C. Lawton*, whom the testator appointed one of his original trustees. After *Lawton's* death the Defendant and his co-trustee *Firmin* appointed *G. B. Turner*, the Defendant's partner, steward of the manor; and he received from the tenants of the manor customary fees for enfranchisements, leases and other manorial business, which he carried to the credit of the firm, and the Defendant claimed to be entitled to share in the profits derived from such fees.

Firmin died on the 30th of September, 1881, and after his death this action was brought by the infant tenant for life against *Elwes*, the surviving trustee for the administration of the estate. The Defendant's firm, through their *London* agents, acted for *Elwes*, who was the only Defendant. During the proceedings in this action a receiver was appointed, and the Defendant's firm, through their *London* agents, acted as solicitors for the receiver, and received profit costs to the amount of £15 5*s.* 1*d.*, part of which the Defendant claimed.

The Defendant also claimed a share of profit costs paid to his firm by certain tenants in respect of leases and agreements for leases of hereditaments forming part of the estate which had been prepared and carried out by himself or his firm.

When the action came on for further consideration an order was made for taxation of costs of the Plaintiff and Defendant as

between solicitor and client, including in the costs of the Defendant any charges and expenses properly incurred by him as trustee beyond the costs of the action; and it having been suggested that the Defendant had already received profit costs, the Taxing Master was directed to inquire into the matter and to disallow the Defendant any profit costs and to charge him in account with such profit costs, if any, as he might have received.

The Taxing Master in his certificate, at the request of the parties, stated the facts before mentioned, and the matter having been brought before Mr. Justice *Kay*, his Lordship disallowed all the profit costs claimed by the Defendant.

The Defendant appealed from this decision.

Giffard, Q.C., and *Bardswell*, for the Appellant:—

With respect to the first class of costs, namely, those made by the Defendant in the proceedings for maintenance, the rule which forbids a solicitor trustee to receive profit costs is confined to cases where he acts for himself alone and does not extend to cases where he is employed and acts for a body of trustees of whom he is one. That has been established by *Cradock* v. *Piper* (1), and is the rule always acted on in the Taxing Master's offices: *In re Barber* (2).

The second class of costs relates to business not really done for the estate but for the receiver, and the firm were not employed by the trustees, but by the receiver: *Lincoln* v. *Windsor* (3). We do not claim any profit costs except those relating to the receiver.

The steward's fees were not profit costs at all, and therefore do not come under the rule. They were received by him as an officer of the manor, and were prescribed by custom and were not taxable by the Taxing Master: *Allen* v. *Aldridge* (4).

With respect to the costs of preparing leases and agreements for leases, they were payable by the tenants not by the estate: *Whitney* v. *Smith* (5). There was no conflict between the interest and duty of the trustee and the reason of the rule does not apply.

(1) 1 Mac. & G. 664.
(2) *Ante*, p. 77.
(3) 9 Hare, 158.
(4) 5 Beav. 401.
(5) Law Rep. 4 Ch. 513.

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Hastings, Q.C., and *Swinfen Eady*, for the Plaintiff:—

There is a preliminary objection to this appeal, which applied also to the hearing before Mr. Justice *Kay*, that in order to raise the question as to the profit costs, in respect of the proceedings for maintenance, the matter of the receiver, and the leases, the Defendant ought to have appealed against the order on further consideration. While that order stands it must be admitted that he is entitled to no profit costs. He now contends that he is entitled to be allowed these items although they are profit costs.

But on the merits we contend that he has no claim to any of these costs. With respect to the proceedings for maintenance the case of *Cradock* v. *Piper* (1) has often been disapproved: *Broughton* v. *Broughton* (2). It is plainly contrary to the principle of the rule that a trustee cannot receive profit by doing the business of the estate. But if the Court should consider itself bound by that authority, it does not apply to this case, because the proceedings were not in a suit, but under the summary jurisdiction of the Court, and the rule in *Cradock* v. *Piper* has never been extended to such proceedings. With respect to the costs of acting for the receiver, they were incurred in the action as much as any other costs.

The steward's fees, although not taxable by the Taxing Master, were profits of business done for the estate, and by sharing in the fees of the steward the Defendant was placing himself in a position where his interest and that of the estate were conflicting: *Lincoln* v. *Windsor* (3).

With respect to the costs of preparing the leases the Defendant was employed on behalf of the estate although by an arrangement with the tenants he was paid by them. If the tenants had been insolvent he could have claimed the costs from the estate.

Giffard, in reply:—

With respect to the preliminary objection, the meaning of the order on further consideration was that the Defendant was to be

(1) 1 Mac. & G. 664. (2) 5 D. M. & G. 160.
(3) 9 Hare, 158.

disallowed such profit costs as a trustee in his position could not claim. It was intended by all parties to leave the question open.

COTTON, L.J. :—

This is an appeal from an order made by Mr. Justice *Kay* consequent upon a direction contained in the order on further consideration; and the question which we have to decide is how far the Defendant, who is a trustee and also a member of a firm of solicitors, having now become the sole trustee on the death of his co-trustee, can receive or retain certain costs in respect of business done, as far as there was any profit arising from these costs. This being an action to administer the estate of the testator, of course there was on further consideration a direction to provide for the costs of the action, and also to provide for any costs, charges, and expenses of the trustee not properly costs in the action. Then after a direction that the costs should be raised there was this clause, "And it being suggested that the Defendant has already received profit costs, the Taxing Master is on taxation to inquire into the matter and to disallow to the Defendant any profit costs, and to charge him in account with such profit costs if any as he may have received."

Then, what was done was this. The parties went before the Taxing Master, and he found at the instance of the parties certain special circumstances, and the matter came before the Court on that finding, and the Court fully entered into the question as to whether under the circumstances the Defendant could retain any profit arising from certain business which he had done, and in respect of which he had received costs. It was argued by Mr. *Graham Hastings* on the part of the Plaintiff that there was what he called a preliminary objection, that we were precluded from entering into questions raised by this appeal in consequence of the terms of the direction, contained in the order on further consideration which I have read. Now in truth that was not a preliminary objection at all. It was an objection to this question being raised either before the Taxing Master, or before Mr. Justice *Kay*, or before us, that is to say, it was not a preliminary objection to this appeal, but an objection, which, if valid, would not only

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have been an answer to this appeal, but would have prevented Mr. Justice *Kay* from entering into this question, which was fully dealt with by him in his judgment, and would have precluded the Taxing Master from entering into the question in respect of which he stated these special circumstances.

But in my opinion that form of the order ought not to preclude us, and does not preclude us, from entering into the question. It was contended by the Respondent that the effect of the words in the order was that any profit arising from costs received by the firm was to be accounted for. On the other hand it was contended by Mr. *Giffard* that the real construction of the order was that it was only that he was to be charged with such profit costs as a trustee solicitor could not properly retain as against the estate. But I do not enter into the question as to what is the true construction of those words by themselves. If the order was dealt with, or ought to have been dealt with, in the way the Respondent contends for, the Master ought not to have found any special circumstances, because there was no question to which those special circumstances could be applicable, and Mr. Justice *Kay* ought not to have heard a long and able argument as to the question of the right of a trustee in the special circumstances stated to retain the profit arising from the costs; but the objection was never taken till the matter came here. Both before Mr. Justice *Kay* and the Master the parties treated the question as one in which it was open to consideration whether the trustee could under the circumstances stated retain the profit arising from the costs which he had received. And I may say here that in my opinion, but for the concession of the Defendant to have this direction inserted in the order on further consideration, it would have been impossible to have entered into many of the questions which are raised on behalf of the Plaintiff as representing the estate. Because a considerable number of the items, two sets if not three, are items where there has been by the direction of the Court a taxation of the very costs now in question, and the amount found on the taxation without regard to the question of profit was directed to be paid to the solicitor-trustee, that is to the *London* agents of the solicitor or to the firm of which he was a member. But the question whether that could be re-opened in

that way was waived by the Defendant, the solicitor, he not thinking that he had received anything which could be called profit costs in the sense that he could not retain them, and not insisting upon the objection that these costs which he had received had been received under an order of the Court, and after due taxation.

As the so-called preliminary objection does not prevail, we must consider what is the right of the Defendant here. Now, it is a well-established rule, and one founded on sound principles, that a trustee who is a solicitor cannot as a rule make any profits as a solicitor on business which is done by himself or by the firm of which he is a member in matters relating to the estate. There is one very obvious principle which applies, namely, that the trustee must discharge his duty without making any profit out of it. If there is business which a layman cannot properly perform he may employ a solicitor to do that legal business. If it is business which a trustee in his position cannot be expected to discharge, such as receiving rents from a number of small properties, he may employ an agent to collect those rents, but if he chooses to do work, he cannot make a charge against the estate; that is the rule as regards work done out of Court by a trustee, whether acting for himself or for the other trustee as well.

We now must come to consider the first class of these exceptions, for I take them in classes. The first class may be put broadly thus: They are costs incurred for work done by the Defendant's firm for himself and his co-trustee on a summons which was taken out substantially to obtain directions as to the maintenance of the infant Plaintiff. It was said those ought not to be allowed. From the rule I have stated one exception was established by *Cradock* v. *Piper* (1):—that is to say, where there is work done in a suit not on behalf of the trustee, who is a solicitor, alone, but on behalf of himself and a co-trustee, the rule will not prevent the solicitor or his firm from receiving the usual costs, if the costs of appearing for and acting for the two have not increased the expense; that is to say, if the trustee himself has not added to the expense which would have been incurred if he or his firm had appeared only for his co-trustee. For that there

(1) 1 Mac. & G. 664.

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is an obvious reason—that it is not the business of a trustee, although he is a solicitor, to act as solicitor for his co-trustee. But the exception in *Cradock* v. *Piper* (1) is limited expressly to the costs incurred in respect of business done in an action or a suit, and it may be an anomaly that that exception should apply to such a case, and should not apply to business done out of Court by the solicitor for himself as trustee and his co-trustee. But there may be this reason for it, that in an action, although costs are not always hostilely taxed, yet there may be a taxation where parties other than the trustee-solicitor may appear and test the propriety of the costs, and the Court can disallow altogether the costs of any proceedings which may appear to be vexatious or improperly undertaken. But whatever may be the principle, the question is whether that is not an established rule. In my opinion, as it is a rule laid down by Lord *Cottenham* so long ago as 1850, it would be wrong of this Court, even if they would not originally have arrived at the same conclusion as Lord *Cottenham* did in that case, to disturb the rule and reverse the decision. He was Lord Chancellor, sitting as a Court of Appeal, and a Court of co-ordinate jurisdiction with our own Court, and although learned Judges have expressed disapproval of that decision, it has been recognised as a rule in taxing costs from the time of the decision down to the present time. In *Broughton* v. *Broughton* (2) Lord *Cranworth* said that he could not understand the decision, but he did not overrule the case; and Lord Justice *Turner*, when Vice-Chancellor, in *Lincoln* v. *Windsor* (3), treated it as an established rule. All those who knew Lord Justice *Turner* would agree in opinion that there was no Judge more careful in any statement which he made, although not directly applicable to the decision of the case before him, than he was. Any statement of his view as to what was the rule of the Court is one which ought to be received with the greatest respect.

It appears also that Mr. Justice *Chitty*, in *In re Barber* (4), found that in the Taxing Master's office, as a fact, the exception laid down by Lord *Cottenham* in *Cradock* v. *Piper* had been

(1) 1 Mac. & G. 664.
(2) 5 D. M. & G. 160.
(3) 9 Hare, 160.
(4) *Ante*, p. 77.

followed in taxing costs. Therefore not only was this exception laid down by Lord *Cottenham*, but it has been treated for a long period—since 1850—as a rule to be followed in taxing costs. That being so, in my opinion, subject to the point which has been suggested as taking this case out of the exception, that decision ought to be followed.

Then what is said to be the special difference in this case? It is said that the exception would only apply to costs in a hostile action, and that this was not an action at all, but only a summons, and that therefore the exception ought not to apply. Undoubtedly the proceeding was not in any hostile action, but was commenced, as I understand, by a summons; but, in my opinion, it would be frittering away the decision, which we ought not to overrule, by saying that it only applies to a hostile action, no such limitation being laid down by Lord *Cottenham*. Therefore I am of opinion that the rule by way of exception established in *Cradock* v. *Piper* (1) does apply to the first part of the costs, and we cannot agree with Mr. Justice *Kay* as regards that part of his decision. Those costs, I think, the Defendant, the trustee, ought not to be required to bring into account.

We next come to the second class of items, namely, costs for work done by the Defendant's firm in respect of the passing of the receiver's accounts. Now, it appears that there was some discussion as to who should act for the receiver in passing the account. The present solicitors of this Plaintiff were then acting for him, and there was an objection to the original solicitor for the Plaintiff acting for the receiver, who said he required assistance in preparing and passing his accounts. Then there was some objection to the Defendant's firm, and it was suggested that somebody else should act; but he was also objected to. Ultimately the Defendant's firm acted for the receiver.

Now this, to my mind, stands in a different position to the costs that I have hitherto considered, which were costs earned by the firm of the trustee-solicitor acting for himself alone, or for himself and his co-trustee. These are costs earned while he was acting for a person not in any way a trustee, and it was urged upon us that it is not part of the trustee's duty to act as receiver or

(1) 1 Mac. & G. 664.

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to act as solicitor for the receiver, and undoubtedly that is so. Therefore, in my opinion, these costs do not come within the same position as costs to which the rule discussed in *Cradock* v. *Piper* (1) applies. But can the Defendant claim not to account for those costs? I have no suspicion that the Defendant or his firm acted with any sinister object, or in any way thought they were not doing their duty in the action, but, in my opinion, the receiver, and the Defendant's firm for him, were acting in a position not, indeed, hostile, but adverse to the interests of the estate; that is to say, the receiver was seeking to avoid being charged with more than he admitted to be due from him; and he was desirous of maintaining against the estate any payment which he might have made and which might be questioned by those who had the conduct of the proceedings. Therefore in the proceedings the solicitor was taking a position adverse to the estate, and, in my opinion, it is wrong for a trustee who is a solicitor in such a proceeding to act for the person who occupies an adverse position, not on the ground that he is making a profit by his trusteeship, but because he is putting himself into a position adverse to the estate of which he is trustee, a position inconsistent with the due discharge of his duty to the estate, which was to get everything he could from the receiver, and to obtain the disallowance of any payments by the receiver to which he was not legally entitled. In my opinion the course which should have been adopted in this case, when the question as to the taxation of these costs and payments out of the estate originally came before the Court, would have been to disallow the trustee any profit which he had made in consequence of his firm having put themselves voluntarily into a position where there was a temptation to act adversely to the duty imposed upon the Defendant by accepting the trusteeship.

But it was said that this would not agree with the decisions. What was decided in *Lincoln* v. *Windsor* (2) and *Whitney* v. *Smith* (3), which followed it, was that where the trustee was a solicitor and had acted not only for himself but had also acted separately for a mortgagee he would be allowed the costs incurred

(1) 1 Mac. & G. 664. (2) 9 Hare, 158.
(3) Law Rep. 4 Ch. 513.

by him when acting for the mortgagee, even though he would not be allowed the costs incurred by him when acting for himself. But although a mortgagee may undoubtedly occupy a position adverse to the estate by making claims against it which the trustee on behalf of the estate would have to resist, I do not find that there was anything of that kind in *Lincoln* v. *Windsor* (1). It may be that the mortgagee has the same interest in questions relating to the estate as the trustee, and if that case were to be considered as establishing that where the solicitor-trustee acts for a mortgagee in proceedings adverse to the estate, it was the opinion of Lord Justice *Turner* that the solicitor would be entitled to his costs, although I have the greatest respect for his opinion I should feel bound to act on my own view in such a case as this. In my opinion, therefore, the decision of Mr. Justice *Kay* as to the costs in relation to the receiver was right.

Then I come to another set of costs. Those are costs which were incurred with reference to leases which were granted to certain tenants, and those costs were paid by the tenants. Now here, to my mind, a great deal depends on what the facts of the case are. It was contended by the Respondent that really those costs related to business done on behalf of the tenants, and that the rule did not apply to those costs. But, in my opinion, that is not the real result of the evidence, and I think that is clear from one particular item in the schedule with reference to these costs, where half the costs of a particular lease were said to have been paid by the tenants, and there is a note that the other half was not charged because the solicitor did not consider he was entitled to charge those as against the estate. The ordinary practice is well-known. A landowner, an intending lessor, employs a solicitor to do the work, that is to say, to prepare the leases; but it is a most usual term of the arrangement that the person who takes the lease shall bear the cost of it, though it has been prepared by the solicitor of the lessor on his instructions. And having regard to the evidence in this case I am of opinion that these costs were costs in respect of business done on the employment of the trustee, although by arrangement, or according to the ordinary course, they were paid by the tenant either in whole or in part. I think

(1) 9 Hare, 158.

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therefore that as regards the costs relating to these leases the decision of Mr. Justice *Kay* was correct, and the appeal on that point fails, as well as on the question of the receiver's costs.

Then we come to the only remaining items. Those were certain fees received not by the firm but by a member of the firm who was appointed by the trustee to be steward of a certain manor, of which the trustees were lords, and brought by him into the partnership account. The question we have to consider is, whether Mr. Justice *Kay* was right in saying that the Defendant was chargeable with any profit coming to him as partner in respect of those fees. Now here the objection is raised by the Defendant that those fees did not come within the terms of the reference contained in the decree on further consideration, because that direction was simply that there should be an inquiry what profit costs he had received, and these could not be said in any way to be profit costs: because that expression refers to costs received by the solicitor as such, costs which could be inquired into by the Taxing Master, who is the proper officer to deal with such matters. In my opinion if we were to look to the terms of the order only that would be so, but then in overruling the so-called preliminary objection of the Plaintiff—who is the Respondent here—we dealt with the matter on this footing, that the parties had consented to meet one another not on the mere reference directed on the assumption that all profit costs were to be chargeable as against the Defendant, even though, according to established rule, he might be entitled to receive them; but they went before the Master and before the Court on the contest whether it was right that these trustees should be charged with the profit arising from the transactions in the special circumstances of the case. Therefore we must look at the question on the merits. The performance of the duty of steward of the manor was in no way a duty which was undertaken by the trustee. It was not part of his duty as trustee, nor was he as steward in any way performing any duties which were undertaken by the trustees as trustees when they undertook the trust. But then I think Mr. Justice *Kay* decided on this ground—that the fees payable to the steward might be insisted upon in such a way as to be prejudicial to the estate; and that although the steward was not a

trustee he was appointed by the trustees, and was a member of their firm, and in consequence of having placed himself in a position where he might charge those fees in such a way as to prejudice the estate, the trustee who appointed him or concurred in appointing him, ought to bring into account the profits arising from that appointment.

Now we have not to deal with a case where the appointment was objected to on the ground that it was improper or collusive, or that there was any fraudulent purpose, or where there is any suggestion that the steward has in fact acted improperly. It is the mere case of a partner in a firm who has been appointed steward and has received fees. I understand those fees are simply the fees which he would receive *quâ* steward, and not any charges made by him as a solicitor for business done in recovering the fees. In my opinion it would be wrong to charge the trustee, who is a solicitor and a member of the firm to which the steward belonged, with the profits which have arisen from those fees, not arising from the discharge of any duty which the trustee as such ought to have discharged gratuitously to the estate, and not being payments for costs in respect of business where the tenant was acting in any way adversely to the estate.

In my opinion, therefore, on that point the opinion of Mr. Justice *Kay* was wrong, and the trustee ought not to be charged with the profit arising from the receipt of those fees.

LINDLEY, L.J.:—

I agree with the result, and also with the reasons which have been given by the Lord Justice, in which he expressed the view of the whole of us, therefore I shall say nothing, except as to those points in which we differ from Mr. Justice *Kay*. As to those in which we agree with him, I can add nothing to what he and Lord Justice *Cotton* have said. As to the first class of items, that raises the question as to *Cradock* v. *Piper* (1). I am not one of those who admire the decision in *Cradock* v. *Piper*. It is one of those cases which are anomalous, but which have laid down a certain rule, and that rule has been acted upon by everybody whom it concerns for so long a time that we cannot and ought not

(1) 1 Mac. & G. 664.

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to vary it. It was a rule laid down by Lord *Cottenham* when Lord Chancellor in 1850, and it has been acted upon ever since by the Taxing Masters, and therefore we must accept it; but we must accept it as an anomalous rule applicable to the case to which it applies, and which ought not to be extended. But although we ought not to extend the rule, it will not do to fritter it away. It appears to me that we should be frittering it away, if we were to hold that the first class of items did not come within it. The first class of items represent costs on the summons in the matter of maintenance of the infant. With reference to the point under consideration there is no substantial difference between such a proceeding and a suit. It is the same thing in another shape, and I think it would be not only limiting the case, but evading it, if we were to say that the rule in *Cradock* v. *Piper* (1) did not apply to such cases as those.

Then as to the steward's fees, I have very carefully considered the reasons given by Mr. Justice *Kay* for the decision he came to, and I cannot help thinking that he has lost sight of the real fact, and that is that these steward's fees have nothing to do with professional charges. They are described as simply steward's fees, as I understand, and not professional charges, but customary charges paid by the custom of the manor or under the *Enfranchisement Acts*. I think Mr. Justice *Kay* has decided against the solicitor on that point under the impression that the expression "steward's fees," in the schedule to the Act, included more than I understand them to include. On that ground I differ on that point.

LOPES, L.J.:—

After the judgments that have been delivered, I almost feel it is unnecessary for me to add anything; still the case is so important that I shall venture to make some few observations of my own. It is a well-established and most wholesome principle that a trustee shall not make a profit out of his trusteeship, and a solicitor who is a trustee or a partner in a firm of which the trustee is a member cannot, in the absence of an enabling clause, charge the trust estate with more than costs out of pocket for profes-

(1) 1 Mac. & G. 664.

sional work done in or out of Court in connection with the trust estate.

The main principle is well expressed in the case of *Broughton* v. *Broughton* (1), and, as I understand it, it is in substance this, that a trustee is not to be allowed to put himself in such a position that his interest and his duty towards the trust estate may conflict. It is difficult to say that duty and interest may not be in antagonism in any case where a trustee makes a profit, and if the matter were *res integra*, speaking for myself, I should be inclined to go the length of saying in no circumstances ought a trustee to be allowed to make a profit out of the trust estate. But an exception to that has been made in the case of *Cradock* v. *Piper* (2). I quite agree with the view taken by the rest of the Court, that after the lapse of years, and the uniformity with which that case has been acted on, it would be unreasonable to overrule that case if the Court had power to do so. I am making this observation for myself, namely, that I cannot appreciate a difference between a case where a solicitor appears for another as well as himself, or the distinction between costs incurred in a suit and costs incurred in administration of an estate without a suit.

Passing from that, I now deal with the case as it comes before us. If the form of the order in this case had been strictly complied with, there would have been little difficulty in dealing with it. This would have been a comparatively small matter on which the Court would have had to determine, but neither side appears to have confined themselves to the strict form of the order. The conduct of the parties throughout was this. There was a dealing, not only with profits that were taxable costs, but profits in general. I think, therefore, the Court has adopted a right course in dealing with the matter in that form.

The first matters which arise are certain costs incurred by the Defendant in respect of work done by the trustee for himself and co-trustee in respect of a summons taken out for the maintenance of the infant. Now this case is governed, to my mind, by the case of *Cradock* v. *Piper*, although there it was work done in an action whereas here it is work done on a summons. I

(1) 5 D. M. & G. 160. (2) 1 Mac. & G. 664.

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do not think that makes any substantial difference; therefore as to those costs I think Mr. Justice *Kay* was wrong in the conclusion at which he arrived.

The second class of items is in respect of work done in passing the receiver's account. The Defendant, a trustee-solicitor, was employed by the receiver, and the costs came out of the estate. This appears to me clearly to fall within the rule where the duty and the interest of the trustee conflict. It would be to his interest to make the costs as high as possible, I do not for a moment suggest that he did, but that would be his interest. On the other hand, it would be his duty to keep them down as far as he possibly could, and to the utmost of his power protect the trust estate. I think, therefore, Mr. Justice *Kay* was right in the conclusion at which he arrived in respect of those items.

Then as to the third class of items—costs in respect of leases. I quite agree with what has been said by Lord Justice *Cotton* and Lord Justice *Lindley* with regard to that. No doubt they were costs paid by the tenant, but the employment was the employment of the landlord, and they were really costs incurred on the employment of the landlord, who in this case would be the trustee. I think Mr. Justice *Kay* was right in the conclusion at which he arrived on that point.

The fourth class of items are fees received as steward of the manor which was part of the trust estate, fees not received by the trustee, but received by the partner of the trustee, the partner being appointed steward of the manor by the trustee. These costs were brought into the partnership account. I do not myself see any difference between the partner and the trustee here. I think the case is very much the same as if the trustee had been the steward, but assuming the trustee himself had been steward, I think Mr. Justice *Kay* was wrong in the conclusion at which he arrived. Those fees did not come out of the trust estate, and I assume they were fixed fees, what I would call customary manorial fees, fees which anyone might have received as steward, whether he was trustee or not, or whether he was solicitor or not. There is no suggestion, it is to be observed, of any improper conduct with regard to those fees. The case would have been very different if there had been. They appear to me to be fees not

arising from any duty which the trustee had to discharge towards the trust estate in any way. I think Mr. Justice *Kay* was wrong in the conclusion at which he arrived with regard to those fees, and the trustees ought not to be called upon to account with respect to them.

Solicitors for the Appellant: *Elwes & Sharpe.*
Solicitor for the Plaintiff: *C. J. MacColla.*

M. W.

CROWTHER *v.* ELGOOD.

[1886 C. 2489.]

Arrest of Debtor—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-s.* 3 [*Revised Ed. Statutes, vol. xvi., p.* 112]—*Fiduciary Capacity—Auctioneer.*

An auctioneer is a person acting in a fiduciary capacity within the meaning of the *Debtors Act,* 1869, s. 4, sub-s. 3, and if he makes default in payment of the money produced by the sale of goods entrusted to him for sale when ordered to pay it by a Court of Equity he is liable to attachment, whether he still holds the money or has parted with it.

THE corporation of *Kidderminster,* who were creditors of a testator, *Edward Henry Crowther,* brought an action against *W. A. Crowther* and *Clement Crowther,* as executors of his estate, praying for administration of the estate. In this action *J. Mossop* was appointed receiver to collect and get in the outstanding estate of the testator, and in particular certain farming stock and effects on a farm comprised in a lease to him of the 1st of December, 1885.

Previously to the commencement of the action Messrs. *Crowther* had instructed the Defendant, *Joseph Elgood,* to sell the stock and effects on the farm by auction.

Elgood having been served with the order appointing the receiver, sold the property on the 26th of January, 1886, and received £1206 16*s.* from the purchasers, as the proceeds of the sale. A portion of this sum he had paid to the receiver, but £638 13*s.* 10*d.* was still due from him.

On the 29th of June, 1886, the receiver, with the leave of the

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Court, commenced an action in the name of Messrs. *Crowther* against *Elgood*, claiming payment by him of what was due to the receiver of the estate of *E. H. Crowther*, deceased.

By an order made in this action on the 13th of December, 1886, and duly served upon him, *Elgood* was ordered to pay the sum of £638 13*s.* 10*d.* to the receiver within four days.

On the 6th of January, 1887, *Elgood* called a meeting of his creditors, and laid before them a statement shewing that he was entirely unable to meet his pecuniary obligations, whereupon the creditors agreed to accept a composition of 5*s.* in the pound, but the receiver was not a party to the composition proceedings.

The money not having been paid, the Plaintiffs moved, on the 28th of January, 1887, before Mr. Justice *Kay* that a writ of attachment might issue against the Defendant *Elgood*.

In an affidavit *Elgood* expressed his intention of continuing his business as an auctioneer.

Woodroffe, for the motion, contended that *Elgood* was "a person acting in a fiduciary capacity" within the meaning of the exception in sect. 4, sub-sect. 3, of the *Debtors Act*, 1869 (1): *Hutchinson* v. *Hartmont* (2); *In re Hallett's Estate* (3); *New Zealand and Australian Land Company* v. *Ruston* (4).

Ince, Q.C., and *Nalder*, for *Elgood*:—

The policy of the Act is not vindictive. It must be shewn that imprisonment will be productive of payment: *Barrett* v. *Hammond* (5). Payment in this case is impossible. Under sect. 1 of the *Debtors Act*, 1878, the Court may exercise its discretion as to granting or refusing an order for attachment, and it will not proceed so far as to destroy a man's means of livelihood.

(1) 32 & 33 Vict. c. 62, s. 4, abolishes arrest or imprisonment for making default in payment of a sum of money, but exempts from the operation of that enactment, among other things:—

(3.) Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control.

(2) W. N. 1877, p. 29.

(3) 13 Ch. D. 696.

(4) 5 Q. B. D. 474.

(5) 10 Ch. D. 285.

KAY, J :—

In my opinion it is the duty of the Court, in such a case as this, to exercise its power of punishment. The facts are these: Two persons, as the executors of a testator, instructed an auctioneer to sell a portion of the testator's estate. Before the sale took place the auctioneer was served with an order of the Court appointing one *Mossop* a receiver to collect and get in the outstanding estate of the testator, and in particular the proceeds of certain farming stock and effects on a farm comprised in a lease of the 1st of December, 1885, which farming stock and effects were intrusted to this auctioneer for sale. He thereupon sold the property, and a portion of the proceeds of sale was paid over by him to the receiver. A balance of £638 13*s.* 10*d.* being still due from the auctioneer, an order was obtained directing him to pay this balance to the receiver. He disobeyed that order and did not pay the balance to the receiver. He justified that by saying that the executors told him to disregard the order. If I allowed such a plea as that, any order of this Court would soon become a dead letter. The auctioneer disobeyed that order at his peril. I entertain no sort of doubt that he was in a fiduciary capacity within the meaning of the *Debtors Act*, 1869. He was employed to sell part of the estate: therefore, as regards the property entrusted to him to sell, he stood in a fiduciary relation towards his employers; and this fiduciary relation extended to the money received from the sale.

The facts were brought before the Vice-Chancellor, and on the 13th of December, 1886, an order was made that this auctioneer should, before the 29th of December, 1886, pay *Mossop*, the receiver, £638 13*s.* 10*d.* That order has not been obeyed. The order has been duly served upon him, and he has paid nothing. He says he is not able to pay. His other creditors have agreed to accept a composition of 5*s.* in the pound, and he proposes to go on trading as an auctioneer. It is said that if I commit him to prison I shall destroy his means of livelihood; but it does not appear to me to be essential to the benefit of the community that a man who has so conducted himself should go on trading as an auctioneer. He has been guilty of a gross contempt of

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Court and of a breach of his duty in not paying the money to the receiver.

I have no doubt that this was the reason for the Vice-Chancellor making the order, and I now make an order for his committal, but I will allow the order to lie in the office for a week, and if he does not pay by that time the amount stated in the Vice-Chancellor's order he must be committed for contempt. In either case he must pay the costs of this motion.

G. I. F. C.

From this decision *Elgood* appealed. The appeal was heard on the 3rd of February, 1887.

Ince, Q.C., and *Nalder*, for the Appellant:—

We do not deny that an auctioneer is in a fiduciary relation towards his employer with respect to the goods entrusted to him, but that does not extend to the money received from the sale of them; at all events after it has been mixed with his own money. In that case it becomes part of his general estate, and would pass to his trustee if he became bankrupt: *Taylor* v. *Plumer* (1); *In re Hallett's Estate* (2). *Elgood* paid the money into his ordinary business banking account, and was guilty of no breach of duty to his employers in doing so. He was a mere debtor for the amount: *Ex parte Dale* (3); *Ryall* v. *Rolle* (4).

[COTTON, L.J.:—*Ex parte Dale* was the case of bankers, and bankers do not hold money in a fiduciary character, they are mere borrowers.]

If the Appellant was in a fiduciary capacity to any one, he was not in such a relation to the receiver to whom he is ordered to pay the money.

Under the *Debtors Act*, 1878 (41 & 42 Vict. c. 54), the Judge has a discretion to refuse to commit, even although the contempt is proved, and this is a case which ought not to be treated with severity; there has been no fraud but only pecuniary difficulty, which the Appellant could not avoid: *Barrett* v. *Hammond* (5).

(1) 3 M. & S. 562.
(2) 13 Ch. D. 696.
(3) 11 Ch. D. 772.
(4) 1 Atk. 165, 172.
(5) 10 Ch. D. 285.

The Court of Appeal has power to review the exercise of the Judge's discretion: *Chard* v. *Jervis* (1); *Witt* v. *Corcoran* (2); *Jarmain* v. *Chatterton* (3).

Woodroffe, for the Plaintiffs, was not called on.

COTTON, L.J.:—

This was an appeal from an order of Mr. Justice *Kay*, by which he directed the Appellant to be attached and sent to prison for not paying a sum of money which he was ordered by the Court to pay. It was contended in the first place that he was not liable to be attached; and secondly, that if he was liable, and the Court had power to issue an attachment, the Judge had a discretion, and that in the exercise of such discretion he ought not to have sent the Appellant to prison. The facts of the case are not in dispute. The Appellant is an auctioneer, who was instructed by Messrs. *Crowther* to sell the farming stock and other articles of the testator. He sold them and received the greater part of the money produced by the sale, some portion of which has been accounted for; and he was ordered by Mr. Justice *Kay* to pay over the balance due from him to *Mossop*, who had been appointed receiver in the creditors' action. The question is whether the case comes within the meaning of the 3rd subsection of sect. 4 of the *Debtors Act*, 1869, in which an exemption is made from the enactment abolishing imprisonment of persons ordered to pay a sum of money, in the case of "default by a trustee, or person acting in a fiduciary capacity, and ordered to pay by a Court of Equity any sum in his possession or under his control." That cannot mean any sum which at the time of making the order was in his possession or under his control, but any sum which had at one time been in his possession or under his control. It is contended here that the Appellant did not come within this exception, on the ground that the money never was under his control as trust money: and that if he had mixed it with his own money and had become bankrupt it would have passed to his trustee. But the effect of a bankruptcy is not the

(1) 9 Q. B. D. 178. (2) 2 Ch. D. 69.
(3) 20 Ch. D. 493.

C. A. 1887 CROWTHER v. ELGOOD. Cotton, L.J.

question here, but whether there is a default by a person in a fiduciary capacity to pay money within the meaning of the section. In the first place, was the Appellant acting in a fiduciary capacity in the transaction? In my opinion he was. He was an auctioneer, and as such he held the goods in trust to sell them for the benefit of the person who entrusted them to him; and if any deposit was paid at the time of the sale, he held it in trust for the vendor. It was not in fact disputed that an auctioneer is in a fiduciary capacity as to the goods, and it appears to me to follow that when he has received the money produced by the sale, he holds that as the money of his principal. It is not necessary to enter into the question whether it is his duty to keep that money separate from his own, or whether the money is trust money. In the ordinary case of a trustee who becomes bankrupt, if the money has been mixed with his general assets, or if it has been lost, the *cestui que trust* can only stand as a creditor in the bankruptcy and obtain a dividend; and yet the trustee is liable to an order to pay the money, and if he makes default he is liable under the Act to be attached. The only question, therefore, is whether the auctioneer has been acting in a fiduciary capacity, so as to be liable within the meaning of the sub-section, and I am of opinion that he has.

But it is said that, at all events, he was not acting in a fiduciary capacity towards *Mossop*, the receiver. But who was *Mossop*? He only represented the personal representatives of the person who employed *Elgood*. The creditors of the deceased had no right to the money, but only the executors: the executors having in some way misconducted themselves, the receiver was appointed by the Court to represent them. No order could be made to pay the money to anyone but the persons representing the testator, and therefore the only way to obtain the money was to direct payment to *Mossop*, who represented the personal representatives. That objection therefore cannot prevail.

Then we are asked to review the discretion of the Judge, and to decide that under the circumstances of this case the Appellant ought not to be sent to prison, and *Chard* v. *Jervis* (1) was cited in favour of that contention. But that case was under a

(1) 9 Q. B. D. 178.

different section of the Act, namely, sect. 5, sub-sect. 2, which restricted the powers of the Court to commit in such a way as to make it depend upon the effect of the facts; just as where, on a motion to commit a man, the Court makes no order except as to costs, the Court of Appeal will entertain an appeal and will enter into the question whether there has been a contempt or not, because on that fact depends the jurisdiction of the Court to make any order as against him. But where it is decided that there has been a contempt, it would be wrong in the Court to interfere with the discretion which the Judge has under the *Debtors Act*, 1878. In the present case, it being proved that a contempt has been committed under the *Debtors Act*, 1869, in my opinion we ought not to interfere with the discretion of the Judge in accordance with the general rule that where discretion is given to a Judge the Court of Appeal ought not to review his decision unless he has declined to exercise his discretion, or has manifestly proceeded on a wrong ground.

LINDLEY, L.J.:—

I quite agree. When the facts are considered there can be no reasonable doubt that the Appellant was acting in a fiduciary capacity, and that the view taken by Mr. Justice *Kay* was correct. And as he had jurisdiction to commit the Appellant the Court of Appeal ought not to interfere with his discretion unless it were shewn that he acted on a manifestly erroneous principle. The appeal therefore fails.

LOPES, L.J.:—

The intention of the *Debtors Act*, 1869, was to abolish imprisonment in the case of honest debtors, but to retain it for the punishment of dishonest debtors. The 4th section abolished arrest except in certain specified cases; the 5th section gave power of committal in certain other cases. The present case comes within sect. 4 in which several cases of default are exempted, and among others in sub-sect. 3: "Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control." The question is, Was the Appellant acting in a fiduciary capacity

C. A. 1887 CROWTHER v. ELGOOD. Lopes, L.J.

within the meaning of this sub-section? It appears to me impossible to say he was not. An auctioneer is employed to sell the goods entrusted to him, and if not sold to return them to his employer. It is admitted that he is in a fiduciary position with respect to the goods while unsold. I am at a loss to see why he is not equally so as to the money realized by the sale. Mr. Justice *Kay* has held that he was in such a fiduciary position, and I think his judgment was right. Having so decided he proceeded to exercise his discretion and to commit the Appellant to prison. Before the Act of 1878 the Judge had no discretion, but was compelled to commit if the default was proved; but under that Act the Judge has a discretion, and in the present case, in my opinion, he has exercised it. And it is settled law that where a Judge has a discretion the Court of Appeal will not interfere with his decision unless the Judge has not exercised his discretion, or unless he has done so under a clear mistake.

Solicitors: *Hunt*, agent for *Miller Corbet, Kidderminster; Robinson, Preston, & Stow.*

M. W.

C. A. 1886 STIRLING, J. *June* 11; *July* 24. C. A. 1887 *Feb.* 11.

LUMLEY *v.* SIMMONS.

[1885. L. 598]

Bill of Sale—Validity—Form—Rate of Interest—Payment by Instalments—Proviso for forcible Seizure—Power of Sale—Costs and Expenses—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, 13, *and Schedule.*

A bill of sale of personal chattels granted in 1884 to secure £80; (1.) stated the rate of interest as "1s. in the pound per month;" (2.) stated the stipulated times or time of payment of principal and interest as "by equal monthly payments of £8, the first payment to be made on the 1st of March next, but if default be made in any payment when it becomes due then the whole of the principal unpaid and the interest then due shall be at once payable;" (3.) contained a proviso making void the security on payment of the principal sum and interest and any expenses which the grantee might properly incur in lawfully seizing and removing the chattels, and any costs he might properly incur in defending and maintaining his rights under the bill; (4.) a power, in case the grantee became entitled to seize the chattels, to break open doors and windows in order to obtain admission; and (5.) after five clear days from the day of seizure to remove

and sell the chattels and retain out of the proceeds the principal unpaid and interest due and all costs and expenses he might incur as aforesaid and the expenses of sale.

In an action (*inter alia*) for a declaration that the bill of sale was void as not being, in these five respects, in accordance with the form given in the schedule to the *Bills of Sale Act* (1878) *Amendment Act*, 1882 :—

Held, that the bill was valid and did not in any one of these five respects offend against the statute.

In re Morritt (1) followed as to the power to break open doors and windows.

The decision of *Stirling*, J., affirmed.

THE question in this action was whether a bill of sale given by the Plaintiff *Lumley* to the Defendant *Simmons* on the 26th of January, 1884, was in accordance with the form given in the schedule to the *Bills of Sale Act* (1878) *Amendment Act*, 1882. The bill in question was in the following form :—

By indenture of the above date, in consideration of £80 paid to him by *Simmons*, *Lumley* assigned to *Simmons* the chattels specified in the schedule and all chattels which might thereafter belong to him (*Lumley*) "by way of security for the payment of the sum of £80 and interest thereon at the rate of 1*s.* in the pound per month," and *Lumley* agreed and declared that he would duly pay to *Simmons* "the principal sum aforesaid together with the interest then due by equal monthly payments of £8, the first payment to be made on the 1st day of March next, but if default be made in any payment when it becomes due the whole of the said principal sum (or so much thereof as may then remain unpaid) together with the interest then due shall at once become payable." And it was further agreed "that upon payment of the said principal sum and interest and any expenses which the said *Simmons* may incur in lawfully seizing and removing the chattels hereby assigned, and any costs which he may properly incur in defending and maintaining his rights hereunder, this security shall be void; and further, that if the said *Simmons* shall become entitled to seize the chattels hereby assigned, he and his agents may enter and remain upon any premises where the said chattels may be, and if necessary may break open doors and windows in order to obtain admission, and after the expira-

(1) 18 Q. B. D. 222.

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tion of five clear days from the day of seizure may remove the said chattels and sell them by public auction or private contract, and retain out of the proceeds so much of the said principal sum as may then remain unpaid, and the interest then due, and all costs and expenses which he may incur as aforesaid, and the expenses of sale, and also any rent, rates, and taxes which he may pay in respect of the premises where the said chattels may be, and the surplus (if any) shall be paid to the said *Lumley*: provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by *Simmons* for any causes other than those specified in sect. 7 of the *Bills of Sale Act* (1878) *Amendment Act*, 1882."

The fourth instalment became in arrear. *Simmons* took possession of the chattels comprised in the bill, and *Lumley* brought the action to restrain him from continuing in possession, and for a declaration that the bill of sale was void as not being in accordance with the form given in the schedule. The action was heard before Mr. Justice *Stirling* on the 11th of June, 1886.

T. L. Wilkinson, for *Lumley*:—

The *Bills of Sale Act* of 1882 provides in sect. 9 that a bill of sale not in accordance with the form given in the schedule to the Act shall be void; and this bill is not in accordance with the form, because (1.) the rate of interest is not properly stated; *Davis* v. *Burton* (1); *Myers* v. *Elliott* (2); (2.) there is no sufficient statement of the "stipulated time or times of payment"; and (3.) the power to break open doors and windows in order to seize the chattels is not authorized by the Act.

Neville, for *Simmons*:—

The Act is in substance complied with and that is sufficient. The form does not give the whole bill. The statements as to the rate of interest and payment of instalments are clear and sufficient: *Roberts* v. *Roberts* (3).

Wilkinson, in reply.

(1) 11 Q. B. D. 537. (2) 16 Q. B. D. 526.
(3) 13 Q. B. D. 794.

1886, July 24. STIRLING, J. (after stating the facts, continued):—

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Three objections have been taken to the validity of this bill of sale. The first is that the rate of interest has not been properly stated. It is said that reserving the interest at "the rate of 1*s.* in the pound per month" is not in accordance with the form given in the schedule. Now the form given in the schedule provides that the interest shall be secured "at the rate of —— per cent. per annum," with the words "or whatever else may be the rate" in brackets, and it was held in *Davis* v. *Burton* (1), that "The real principle of the form is that, whatever may be the consideration for the sum of money secured by the bill of sale, a fixed sum shall be stated therein in figures and in direct terms, and that sum with rateable interest thereon shall be recovered by the holder; that interest shall be calculated up to the time when the sum mentioned as the principal amount shall be called in." The same principle was applied in *Myers* v. *Elliott* (2), where a bill of sale given to secure repayment of a sum of money together with £15 for agreed interest and bonus thereon, making in all £130, to be paid by monthly instalments of £10 16*s.* 8*d.*, was held void, but the decision was grounded on the fact that a bonus was included in the interest. I do not fail to observe that the *dicta* went much further, and that the Court held that even if the whole £15 were to be regarded as interest, the bill of sale would have been void. The Master of the Rolls said (3): "But assuming, as was suggested, that the words 'bonus' and 'interest' meant the same thing, and the £15 was all interest, there would then remain the question whether, under the Act, the bill of sale may specify merely a lump sum for interest, leaving the borrower to calculate from such lump sum the rate of interest, even although such a calculation might be one requiring the qualifications of an expert arithmetician or actuary to make it. We cannot, I think, on this occasion decide that question, so as to create a binding authority on the subject. But it seems to me as at present advised that, if a bill of sale could be so framed, it would be letting in all the mischief that the Act, in my opinion, intended to prevent. I think that the effect would be that the

(1) 11 Q. B. D. 540. (2) 16 Q. B. D. 526.
(3) 16 Q. B. D. 529, 530, 531.

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borrower might be borrowing money without having any idea of the rate of interest he was to pay, whereas the intention of the Legislature is that he shall be distinctly informed what such rate is, so that, if it be manifestly exorbitant, his attention may be called to the folly he is committing." Lord Justice *Lindley* said: "It appears to me that it is impossible to tell from this bill of sale what the rate of interest is, because the £15 includes both interest and bonus, and it is impossible to say how much is one and how much the other. Even if the whole must be looked on as interest, it would be exceedingly difficult to calculate the rate of interest," and held that the form given in the schedule to the Act had been substantially departed from. And Lord Justice *Lopes* said: "With regard to the question whether the rate of interest must be stated, it is worthy of observation how precise the provisions of the form in the schedule are on that point. It says, 'and interest thereon at the rate of —— per cent. per annum [or whatever else may be the rate],' meaning thereby, as I understand it, that the bill of sale is to specify the percentage per annum, or per month, or whatever the rate may be; and the form then goes on: 'And the said *A. B.* doth further agree and declare that he will duly pay to the said *C. D.* the principal sum aforesaid, together with the interest then due, by equal —— payments of £—— on the —— day of —— [or whatever else may be the stipulated times or time of payment],' thus carefully keeping principal and interest entirely separate throughout." Now the question I have to decide is, does this bill of sale specify a rate of interest. It seems to me it does, and that the rate specified is "one shilling in the pound per month." The form in the schedule does not restrict the rate to a rate per cent. or per annum, and I think it would be drawing too fine a distinction if I held this bill of sale void because it does not reserve interest at a percentage per annum although it does clearly state a rate of interest. I am therefore of opinion that the first objection is not tenable, and that the rate of interest is sufficiently stated.

The second objection is, that this bill of sale being a security for payment of a principal sum by instalments, the whole is to become due if default is made in payment of any instalment,

and the same two cases that I have referred to are relied on. But in my opinion both of those cases are clearly distinguishable. In both of them a lump sum was added to the principal. Here it is provided that in case of default in payment of any instalment the whole of the money shall become due at once. Now when we look at the grounds of the decision of the Court of Appeal in *Davis* v. *Burton* (1) the reason given is that there was a distinct departure from the form in the schedule to the Act. The Master of the Rolls said (2): "The grantee must not attempt to alter the sum secured, and nothing must be added to it except by way of rateable interest. The statute does not prevent payment of the principal sum by instalments together with interest from time to time falling due; and at the time of paying each instalment interest at the agreed and named rate may be added. And I do not think that the statute prevents the payment of interest by instalments becoming due at fixed periods. But if upon failure to pay the first instalment the whole of the interest, which the grantee is ultimately upon performance of the contract to receive, becomes immediately payable, the bill of sale would, I think, be contrary to the form in the schedule of the Act; for interest is payable upon money only so long as it is due, and it is contrary to the nature of interest to make it payable before it is due, on the ground that a condition has not been performed, or because a certain event has happened; that is an alteration of, and a departure from, the form given in the schedule to the Act. There is, therefore, a blot upon the bill of sale before us; for upon breach of the covenants, it may be immediately after the execution of the bill of sale, the sum secured may be altered into a larger sum by means of what is called 'capitalized interest:' in truth it is not interest at all, because the holder of the bill of sale may at any time repay himself the £300 and take the £180 besides. The effect of the provisions is that upon breach of any of the covenants he shall be paid those two amounts in full." And Lord Justice *Fry* said (3): "A fixed sum by way of interest may be lawful. The argument for the claimant overlooks the fact that the Legislature intended to make all bills of sale

(1) 11 Q. B. D. 537. (2) 11 Q. B. D. 540.
(3) 11 Q. B. D. 542.

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certain in their terms, and therefore that certainty is very material in drawing bills of sale; but this bill of sale leaves it uncertain at what time the grantee may become entitled to the whole of the capitalised interest." The same ground was relied on in *Myers* v. *Elliott* (1). There a lump sum of £15 for interest and bonus was added to the principal sum, which was made payable by instalments, and the Master of the Rolls said (2): "The true construction of the provision in this bill of sale with regard to seizure of the goods assigned seems to me to be that, on default in payment of one of the instalments, the grantee of the bill of sale becomes entitled to exercise his full rights as owner of the goods, and accordingly may sell the whole of them and receive the proceeds, accounting to the grantor only for any balance realized over and above the sum of £130 secured by the bill of sale." Lord Justice *Lindley* said (3): "I cannot understand this bill of sale otherwise than as entitling the grantee to seize and sell the goods on default in payment of any of the monthly instalments, and to retain the proceeds to the extent of the whole sum secured. If that is the true construction of it, the case comes directly within the authority of *Davis* v. *Burton* (4)." And Lord Justice *Lopes* expressed a similar opinion. In the present case all that happens is, that if default is made in payment of any instalment the whole of the principal moneys become payable, but no attempt has been made to capitalise the interest or to add it by way of bonus to the principal. I am therefore of opinion that this bill of sale does not fall within the two cases that have been cited. But I have still to consider whether it is in accordance with the form in the schedule, which requires that a stipulated time or times of payment shall be mentioned. I am not aware of any direct authority on the case before me. In *Hetherington* v. *Groome* (5) the money secured by the bill of sale was made payable on demand, and it was held that an agreement to pay the money on demand was not an agreement to pay it at a stipulated time in accordance with the form in the schedule to the Act. There Lord Justice *Fry* in giving judgment says: "Is

(1) 16 Q. B. D. 526.
(2) Ibid. 528.
(3) 16 Q. B. D. 530.
(4) 11 Q. B. D. 537.
(5) 13 Q. B. D. 789, 792.

a payment on demand a payment at a time in the bill of sale provided for or thereby stipulated? The words of the statute and the schedule are perhaps not clear; they may well include a time fixed by reference to any known event; they may perhaps include a time to be ascertained by the happening of some contingency, but they do not in our opinion include a time to be ascertained by nothing but the mere choice and volition of the holder of the bill of sale." But it seems to me that this bill of sale does provide for stipulated times of payment. The principal moneys are made payable by ten instalments, and if default is made in payment of any instalment then the whole amount becomes payable. I think, therefore, that in this respect the bill of sale is not at variance with the form in the schedule.

The third objection that has been raised is that this bill of sale provides for forcible entry and seizure of the chattels by the grantee. With reference to that, it is said that these clauses are an unauthorized addition to the form in the schedule, but that form does provide for other clauses. It says: "And the said *A. B.* doth also agree with the said *C. D.* that he will," and then follow in italics these words: "here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security." Then are these clauses terms as to the maintenance or defeasance of the security? On this there is authority. In *Consolidated Credit and Mortgage Corporation* v. *Gosney* (1) a bill of sale was impeached on the ground (amongst others) that it contained a clause permitting seizure and sale in certain events, and Mr. Justice *Day* said: "It is no doubt provided by sect. 9 that a bill of sale made or given by way of security for the payment of money by the grantor is to be void unless made in accordance with the form in the schedule. But we must put on these words a reasonable interpretation, and hold that substantial though not literal accordance with the form is sufficient. I do not see how a bill of sale can be held to be vitiated by the introduction into it of clauses which are the very gist of the security, as for instance, a power to sell the goods. Yet there is nothing in the Act which expressly authorizes the insertion of such a power, unless, indeed,

(1) 16 Q. B. D. 24, 25, 26.

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the term 'defeasance' covers such a case. I find it difficult to interpret that word unless it means realization. The word is not apt, but that is the best meaning I can put upon it, and if that is its meaning, all the clauses of this deed which are objected to come within one or other of the heads of maintenance or defeasance. . . . . The clause as to seizure and payment of incumbrances may perhaps come under both heads, at all events it comes under the second. I think none of the stipulations which have been called to our attention can be said to be otherwise than in substantial accordance with the provisions of the Act," and Mr. Justice *Smith* said: "I agree in thinking that defeasance means getting rid of the deed, that is, doing something which will make it cease to be an operative investment. The realization of the security by seizure and sale has that effect, and therefore clauses to carry this out may be properly inserted." It seems to me, therefore, that clauses relating to seizure and sale may be inserted in a bill of sale, but they are additions which must satisfy the rule laid down in *Davis* v. *Burton* (1) that "every bill of sale shall be substantially like the form in the schedule. Nothing substantial must be subtracted from it, and nothing actually inconsistent must be added to it." Now, do these clauses satisfy those conditions? Do they subtract from the form or add anything inconsistent to it? The law on this head has been very rigidly enforced, and in the case of *Ex parte Stanford* (2) the words "as beneficial owner" in the operative part of a bill of sale were held to introduce covenants which vitiated the security. Now, there are two sections of the *Bills of Sale Act*, 1882, which it is material to consider, the 7th and the 13th. [His Lordship read them, and continued:—] Is either of them interfered with by the clauses in question? It appears to me they are not. The clauses are governed by the words "if the Defendant *Simmons* shall become entitled to seize the goods," and then there is at the end a proviso under which sect. 7 is left in force. Therefore, taking the clauses and the proviso together, the powers conferred only come into operation after the events in sect. 7 have happened; and there is no conflict with sect. 13, because removal and sale are not to take place until five days

(1) 11 Q. B. D. 537. (2) 17 Q. B. D. 259.

after seizure. I am unable to find, therefore, that these clauses subtract anything substantial from or add anything inconsistent to the form in the schedule. The decision in *Ex parte Stanford* (1) on the first hearing shews that. I have not to consider whether these provisions are reasonable or unreasonable, so long as they do not contravene the enactment in the *Bills of Sale Act*, 1882. Finding, as I do, that the clauses objected to are not at variance with the statute, it follows that the Plaintiff fails, and must pay the costs of the action.

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H. L. F.

From this decision *Lumley* appealed. The appeal was heard on the 11th of February, 1887.

C. A.

T. L. Wilkinson, for the Appellant:—

1. The notes to the form given in the schedule (which have the authority of an enactment) require that the bill must state the rate of interest, so as to shew its amount per cent. per annum. This is, no doubt, in order to release the grantor from the necessity of a calculation he may be incompetent to make. Here the rate of interest is only stated at so much in the pound per month, and unless this requirement of the Act is complied with, a reservation of interest entailing a difficult calculation, for example, at a fraction of a penny an hour, may come to be inserted. It is true that in *Myers* v. *Elliott* (2) a lump sum was stated for interest and bonus, but the principle is the same, and that case is an authority that this is an insufficient statement of the rate of interest.

2. There is no sufficient statement of "the stipulated time or times of payment," for if there is default in any payment, the whole amount due becomes payable at once. This is a payment at an uncertain time on a contingency, and in the nature of a payment on demand, which has been held to contravene the Act and render the bill void: *Hetherington* v. *Groome* (3).

3. The third objection which was taken in the Court below is no longer open, as since the appeal has been set down it has been held by the Court of Appeal in *In re Morritt* (4) that a proviso

(1) 17 Q. B. D. 259.
(2) 16 Q. B. D. 526.
(3) 13 Q. B. D. 789.
(4) 18 Q. B. D. 222.

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for forcible entry for the purpose of seizure is not a contravention of the Act.

But I further contend (4) that although under the last clause of sect. 7 of the Act the grantor of a bill of sale may apply to the Court or a Judge within five days after seizure of the chattels, and the Judge may, if satisfied that the cause of seizure no longer exists, order the grantee to withdraw from possession, yet under the wording of the power of sale contained in this bill, it might still be exercised afterwards and notwithstanding such an order; and this is clearly improper. 5. The provision enabling the grantee to pay himself his costs and expenses on a sale is inconsistent with the form in the schedule.

[As to a mortgagee's right to costs, he referred to *Cotterell* v. *Stratton* (1).]

Seward Brice, Q.C., for the Respondent, was not called on.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Stirling*, in which he held that the bill of sale in question in this case was good as complying with the provisions of the Act, and dismissed an action to restrain the holder of the bill from enforcing it. The appeal is, in substance, an appeal for costs, and the result will be unfortunate to the Appellant, as he obtains by it nothing but an addition to the costs he has to pay.

The first objection taken to the bill of sale is that it does not state, with reference to the interest, what is the "rate per cent. per annum [or whatever else may be the rate]" according to the form given in the schedule to the Act. Undoubtedly the Act does require that the bill shall state with reasonable certainty what the rate per cent. per annum is to be. I think this bill of sale does so. It states that the security is for the payment of the principal sum of £80 and "interest thereon at the rate of one shilling in the pound per month." The other branch of the Court of Appeal has no doubt held that a bill of sale must not be so framed as to puzzle a poor and ignorant man. But here a person of ordinary intelligence could easily calculate from

(1) Law Rep. 8 Ch. 295.

that statement that the rate of interest was £60 per cent. per annum.

The case of *Myers* v. *Elliott* (1), where it was held that the rate of interest was insufficiently stated, and which was relied upon on behalf of the Appellant, was entirely different from this. There the bill contained the statement that it was by way of security for "the sum of £115, together with the sum of £15, the agreed amount of interest and bonus thereon, making together the sum of £130." And the grantor covenanted to pay "the sum of £130 aforesaid by twelve equal monthly instalments of £10 16*s.* 8*d.*" at specified dates. And there, as Lord Justice *Lindley* points out (2), it was "impossible to tell from this bill of sale what the rate of interest is, because the £15 includes both interest and bonus, and it is impossible to say how much is one and how much the other." This case is quite different, for here the rate of interest per month is stated, and there is quite sufficient to enable any person of ordinary intelligence to calculate what the rate per cent. per annum is.

Then it is said that the form of bill of sale in the schedule annexed to the Act requires that "the stipulated times or time of payment" shall be stated in the bill, and that the statute has not been complied with in this respect. But I think that the bill does contain a sufficient statement of the stipulated times or time of payment; for it contains an agreement by the grantor that he will pay "the principal sum aforesaid, together with the interest then due, by equal monthly instalments of £8, the first payment to be made on the 1st day of March next; but if default be made in any payment when it becomes due the whole of the said principal sum (or so much thereof as may then remain unpaid) together with the interest then due, shall at once become payable." That is, the whole amount shall become payable on the date on which the instalment ought to have been paid, *i.e.*, the first day of the month. That is a stipulated time, and the provision is entirely different from a provision that the money is to be payable on demand, in which case the time of payment is left to the option of the lender. Another point was taken as to the proviso entitling the grantor to make forcible entry after

(1) 16 Q. B. D. 526. (2) 16 Q. B. D. 530.

C. A. 1887 LUMLEY v. SIMMONS. Cotton, L.J.

becoming entitled to seizure, but this has not been pressed, as, in the case of *In re Morritt* (1), the Court of Appeal had decided the point since this appeal was presented.

The next objection was that the bill gave the grantee the right to repay himself his expenses on a sale and any costs which he might properly incur in defending and maintaining his rights under the security, and that that was inconsistent with the form given in the schedule to the Act. But that is not so. In my opinion a provision as to the costs incurred by the grantee in maintaining or defending his rights comes within the terms of the form given in the Act, for there is a note thereto indicating that additions may be made to its provisions in the following words: "here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security." And I do not think that the provision in this case is carried any further. As a general rule a mortgagee is entitled to add to his security all costs properly incurred in defending his security; and in my opinion, without any express stipulation on the point, there would have been an implied one to the same effect arising from the position of the parties and the contract between them as mortgagor and mortgagee. I think, therefore, that this provision adds nothing to what could have been done within the terms of the Act.

The last objection was that according to the last clause of sect. 7 of the Act the grantor may within five days after seizure of the chattels apply to the Court or to a Judge, who, if satisfied that the cause of seizure no longer exists, may restrain the grantee from removing or selling the chattels; and it is contended that on the wording of this bill of sale the power of sale might be exercised after, and notwithstanding an order by the Court or a Judge directing the grantee (if he had entered into possession) to withdraw from possession, and was therefore improper as interfering with the power of the Judge to prevent the removal of the chattels. But I do not think that it could possibly do so, or interfere with the powers of the Judge in any way. I do not think that any Judge, having, as he would have, the facts before him, would fail to add to an order restraining the removal of the

(1) 18 Q. B. D. 222.

goods that which would be required by the justice of the case, *i.e.*, if necessary, an order restraining a sale also. That objection then also fails, and the appeal must, in my opinion, be dismissed with costs.

LINDLEY, L.J.:—

I entirely agree, and I have nothing to add.

LOPES, L.J.:—

I also agree. I will only add as to the point with regard to the statement of the rate of interest, that I adhere to every word I said on this question in my judgment in *Myers* v. *Elliott* (1). There the sum of £15 was described as being bonus and interest, without defining how much was to be attributed to one and how much to the other, and consequently, as I said, it was "impossible for anyone looking at the bill of sale to say how much interest was to be paid." I then stated that it was "worthy of observation how precise the provisions of the form in the schedule are on that point;" and, after referring to them in detail to shew how carefully principal and interest were kept entirely separate throughout, I added: "I believe that the intention was that the clearest possible information should be given to the borrower as to the rate of interest which he was paying: and, therefore, speaking for myself, I do not think that a bill of sale can be made to provide in this way for capitalized interest or bonus without rendering it void under the Act." But in the present case the rate of interest is, in my opinion, sufficiently stated. The rate per month is given clearly, and the rate per annum can be easily calculated by any person of ordinary intelligence. Upon the other points I have nothing to add.

Solicitors: *C. A. Angier; Nordon & Lazarus.*

(1) 16 Q. B. D. 526, 531.

W. W. K.

C. A.
1887
March 8.

In re GREY'S SETTLEMENTS.
ACASON *v.* GREENWOOD.

[1886 G. 1539.]

Husband and Wife—Separate Estate—Restraint on Anticipation—Right to Capital—Construction of Will.

A testator having a general power of appointment over a settled fund, appointed that a sum of £1500 should be raised and paid to his daughter, who was a married woman, absolutely for her separate use, without power of anticipation; and appointed that one-fourth of the residue of the fund should be held upon trust for the same daughter absolutely for her separate use without power of anticipation:—

Held (affirming the decision of *North*, J.), that the daughter was not entitled to payment of the capital of one-fourth of the residue.

THIS was an appeal from a decision of Mr. Justice *North* (1).

The will of *Harry Hanslip Laurence*, deceased, after reciting that he was possessed of general powers of appointment among his children by his late wife, under two settlements made by *William Patrick Grey*, and that he had four such children, contained the following appointments:—

"Now I do hereby in exercise and execution of the power and powers by the hereinbefore recited indentures of settlement and each of them direct and appoint that the sum of £1500, part of the money or investments subjects to such power or powers, shall be raised (clear of expenses and succession duty), and paid to my daughter *Florence Ann Laurence* absolutely, for her sole and separate use, independently of marital control and without power of anticipation during any coverture: And I direct and appoint that the sum of £500, further part of the same money or investments, shall be raised (clear of expenses and succession duty) and paid to my daughter *Susanna Emma*, the wife of *James Edgar Marshall*, absolutely. And I direct and appoint that all and every the residue of the same money or investments (hereinafter referred to as the said residue) shall go and be held upon the following trusts (namely): As to one-fourth share thereof

(1) *Ante*, p. 85.

upon trust for my daughter *Florence Ann Laurence* absolutely, for her sole and separate use, independently of marital control and without power of anticipation during any coverture."

Before the testator's death *Florence Ann Laurence* became the wife of *W. H. Greenwood.*

An originating summons was taken out by the trustees of the settlements to have it determined whether Mrs. *Greenwood* was entitled to the immediate payment of the capital of one-fourth share of the residue of the fund.

No question was raised as to the sum of £1500, which it was understood the trustees were ready to pay to Mrs. *Greenwood.*

Mr. Justice *North* held that Mrs. *Greenwood* was not entitled to payment of the capital of her share of the residue; and she appealed from this decision.

Sladen, for the Appellant:—

The question whether the clause in restraint of anticipation was operative or not, depends on the intention of the testator, and there is nothing in this will to shew that the testator intended that his daughter was not to enjoy the absolute disposal of her share: *In re Bown* (1); *Baggett* v. *Meux* (2). If the restraint on anticipation is held to apply to the capital, the lady will have no power of disposing of it by will, which the testatrix could not have intended.

Vaughan Hawkins, for the trustees of the settlements, was not called on.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *North,* who declined to authorize the trustees of the settlements to pay Mrs. *Greenwood,* who is a married woman, the capital of her share of the fund on the ground that the clause against anticipation precluded her from dealing with the fund. I think the learned Judge was right. The testator first directs that a sum of £1500 shall be raised and paid to the same daughter, absolutely for her separate use. That gift is followed by words restraining her

(1) 27 Ch. D. 411. (2) 1 Coll. 138.

C. A. 1887 *In re* GREY'S SETTLEMENTS. ACASON *v.* GREENWOOD. Cotton, L.J.

from anticipation, but still there is the testator's direction that it shall be paid to her, and she is entitled to receive the capital. Then the testator appoints one-fourth of the residue of the settled fund for the benefit of his daughter, using quite different words [His Lordship read the clause in the will]. The rule is correctly laid down in *In re Bown* (1), that the question whether the restraint on anticipation is to apply not only to the income but also to the capital depends upon the intention of the testator expressed in the will. Here the testator in effect directs that the share of the residue is to be retained by the trustees for the benefit of the lady; therefore she is precluded from disposing of the capital by the restraint on anticipation; for it has been decided that a clause restraining anticipation may apply to a gift of capital as well as to a gift of income, as in *Baggett* v. *Meux* (2). We must therefore look at the settlement or will to see whether it is the intention of the settlor or testator that the fund should go into the hands of the married woman, or that she should only receive the income from the trustees. In the present case, although the will is not perfectly clear, I think that the testator shews an intention that the trustees should hold the capital for the benefit of his daughter, and that could only be done by their keeping the capital in their own hands, and paying the income to the daughter from time to time without power of anticipation.

It is true that there are no express words giving the lady the power of disposing of the fund by will; but it is given to her for her separate use absolutely, and she can make a will disposing of it, and when the will comes into operation the restraint on anticipation will have come to an end.

LINDLEY, L.J.:—

I am of the same opinion. Our decision is quite consistent with *In re Bown*. We have to see if there is sufficient indication of the intention of the testator that the lady is not to have the capital paid to her. I think it clear that the testator intended that it should be held by the trustees and that they should pay

(1) 27 Ch. D. 411. (2) 1 Coll. 138.

the income to her. I think there is no reasonable doubt on the question.

LOPES, L.J.:—

The effect of the clause restraining anticipation must depend upon the intention of the testator as declared in his will. It appears to me that there is sufficient in this will to indicate the intention of the testator that the trustees should keep the fund in their own hands and pay the income only to the lady. Therefore the decision of the learned Judge was right, and the appeal must be dismissed.

Solicitor for Mrs. *Greenwood: S. F. Langham,* agent for *F. A. Langham, Hastings.*

Solicitors for Trustees: *Wright & Pilley.*

M. W.

KAY, J.

1887

Feb. 12, 19.

In re BEVAN'S TRUSTS.

Will—Gift at Twenty-five—Contingent Gift—Remoteness—Separate Fund—Gift over.

A testatrix by her will, dated in 1828, gave all her property to trustees upon trust, as to the interest of a sum of £5000, for her sister for life; and after the death of such sister the interest to be paid to the testatrix's daughter (she having first attained twenty-five): if the daughter married with the consent of the executors, and died "leaving children, the interest to be appropriated for the maintenance and education of such children," of whom the testatrix constituted the executors guardians as to the due application of the same according to their discretion, "and the principal to be divided amongst them as they shall severally attain the age of twenty-five years;" after the death of the sister and in the event of the daughter marrying without consent, or marrying with consent "and dying without leaving issue," then over.

The daughter survived the testatrix, attained twenty-five, and in 1842 married with the necessary consent. The sister died in 1854, and the daughter in 1886, having had two children, who survived her:—

Held, that the gift was not void for remoteness, but that the fund vested in the children of the daughter living at her death.

JULIANA BEVAN by her will, dated in 1828, gave all her property to trustees upon the trusts following, namely: The interest of £5000 secured to her by bond she gave to her sister *Caroline Bevan*, for life; and after the death of her said sister she desired the interest thereof to be paid to her (the testatrix's) daughter *Julia* (she having first attained the age of twenty-five years); "Further, I will that my said daughter having married with the full consent and approbation of my executors, but not otherwise, and dying leaving children, the interest to be appropriated for the maintenance and education of such children, of whom I hereby constitute my executors guardians as to the due application of the same according to their wisdom and uncontrolled discretion, and the principal to be divided amongst them as they shall severally attain the age of twenty-five years. I do hereby likewise will and appoint that after the demise of my sister, and in the event of my daughter marrying without the consent of her guardians, or marrying with such consent and dying without leaving issue, then the said principal sum of £5000, with its accumulations (if

any) shall become the absolute property of" *John Willcox*: and the testatrix appointed the trustees her executors.

The testatrix died in 1829.

Her daughter, *Julia*, attained twenty-five on the 26th of January, 1837, and on the 30th of August, 1842, she married with the consent of the only proving executor of the will. She had two children, both of whom attained twenty-five in her lifetime and were now living. *Caroline Bevan* died in 1854. *Julia* died on the 9th of August, 1886.

The fund having been paid into Court under the *Trustee Relief Act*, *Julia's* two children presented this petition for payment out to them in equal shares.

The question was whether the gift was to be construed as vesting the fund in the children of *Julia* living at her death, or as a contingent gift to those children who attained twenty-five, and therefore void for remoteness.

F. L. Wright, for the Petitioners:—

I submit that, reading the whole will together, the children of *Julia* took vested interests at the death of their mother: *Bree* v. *Perfect* (1).

Marten, Q.C., and *Rawlinson*, for the Respondents, the next of kin:—

We contend that the gift is to a contingent class and is void for remoteness. The case is distinguishable from *Bree* v. *Perfect*, for here there is a gift of interest for maintenance up to twenty-five, so that it cannot be said that the children take a vested interest under that age: *In re Parker* (2). The attainment of twenty-five is of the essence of the gift: *Leake* v. *Robinson* (3); *Walker* v. *Mower* (4); *Gardiner* v. *Slater* (5); *Thomas* v. *Wilberforce* (6); *Murray* v. *Tancred* (7); *Boughton* v. *James* (8); *Mair* v. *Quilter* (9); *Jarman* on Wills (10).

Wright, in reply.

(1) 1 Coll. 128.
(2) 16 Ch. D. 44.
(3) 2 Mer. 363.
(4) 16 Beav. 365.
(5) 25 Beav. 509.
(6) 31 Beav. 299.
(7) 10 Sim. 465.
(8) 1 Coll. 26.
(9) 2 Y. & C. Ch. 465.
(10) 4th Ed. vol. i., p. 839.

KAY, J. 1887 *In re* BEVAN'S TRUSTS.

KAY, J. :—

I will consider this case.

1887. Feb. 19. KAY, J. (after stating the facts, continued) :—

The question is whether this £5000 vested in the children of *Julia* who were living at her death, or whether it only vested in those who attained twenty-five, in which case the gift would be void for remoteness, and the property would belong to the next of kin of the testatrix as in case of intestacy.

The subject of the gift is a specific fund separated from the rest of the testator's property, so that the doctrine of the Court which vests a gift of such a fund at the earliest moment, as in *Saunders* v. *Vautier* (1) and *Dundas* v. *Wolfe Murray* (2) applies to this bequest.

It is impossible to suppose that intestacy was contemplated by this testatrix.

The gift over is in case of the death of *Julia* without leaving issue, an event which did not happen. If the testatrix had intended that only those children of *Julia* should take who attained twenty-five, the gift over would naturally have been in case none of these children attained twenty-five.

Supposing there were no objection on the ground of remoteness, if the bequest is contingent this extraordinary consequence follows—that in case a child of *Julia* survived her, and did not attain twenty-five, that child would take nothing; but the gift over could not take effect, and there would be an intestacy.

Am I bound to give a construction to this will which I am sure was not the meaning of the testatrix, and which will also produce the unfortunate result that the gift to the children must fail, whether they attain twenty-five or not, because it is void for remoteness? If there be any doubt about the construction, as Lord *Selborne* said in *Pearks* v. *Moseley* (3), this is a matter which may be taken into consideration.

The argument is this. A canon of construction it is said was laid down in *Leake* v. *Robinson* (4)—that where there is no gift, except a direction to pay as the objects attain twenty-five, the

(1) Cr. & Ph. 240.
(2) 1 H. & M. 425.
(3) 5 App. Cas. 714, 719.
(4) 2 Mer. 363.

attainment of the age is of the essence of the gift, which must be read as a bequest to those only of the class who attain the specified age. A number of other cases were cited in which this rule was applied.

On the other hand there are cases in which this general rule has been made to give way to particular indications of a contrary intention. In *Bree* v. *Perfect* (1) the gift was upon trust to pay the interest to *Frances Bree* for life, and at her death the principal to be equally divided "among such of her children as shall be living at the time of her death, as they respectively attain twenty-one;" but, if she should "die without leaving issue," over. On the ground of this limitation over, the Court held that the principal vested in the children living at the death of *Frances Bree*. This case was followed by Vice-Chancellor *Wood* (Lord *Hatherley*) in *Ingram* v. *Suckling* (2). The gift there was of certain leasehold property to trustees, upon trust for the testator's wife for life, and after her death for his daughters, *Ann* and *Amelia*, during their lives as tenants in common; and in case either of his daughters should die under twenty-one without leaving issue, to the survivor; and after the respective deaths of his said daughters then in trust for their respective children, as and when they should respectively attain the age of twenty-one years, as tenants in common; and in case his said daughters should die without leaving lawful issue, then over.

Lord *Hatherley* held that the children of the daughters took a vested interest whether they attained twenty-one or not. He relied upon the case of *Bree* v. *Perfect*, and also upon the circumstance that there was a separation of the leaseholds from the rest of the estate. This fact and the terms of the gift over seem to have been the main grounds of his decision.

These cases are not distinguishable from the present, and they have never been overruled.

In this case the class which are *primâ facie* intended to be benefited are the children of *Julia* who survive her. For their benefit the whole of the income is to be applied. Does the testatrix mean more than this—that this trust for maintenance is

(1) 1 Coll. 128. (2) 7 W. R. 386.

KAY, J.
1887
In re BEVAN'S TRUSTS.

to continue in the case of each child until that child attains twenty-five? I read the will as though she had said, "Upon the death of *Julia* the £5000 shall vest in such of her children as may be then living, but I desire my executors to apply the income for the maintenance of them all until each attains twenty-five, when the share of that child is to be paid over to him." This makes the gift over consistent. If any child survives *Julia* the gift over is inoperative.

There is ample authority, as I have shewn, for treating this case as an exception to the rule in *Leake* v. *Robinson* (1), by reason of the subject being a separated fund and the gift over being on the death of the tenant for life without leaving issue. That construction seems to me, for the reasons I have given, much more natural than the other, which would make the gift void. I therefore hold that the fund vested in the children of *Julia* who were living at her death.

Solicitors: *Waterhouse, Winterbotham, & Harrison; Walters, Deverell, & Co.*

(1) 2 Mer. 363.

G. I. F. C.

KAY, J.
1887
March 11.

In re MARSHFIELD.
MARSHFIELD *v.* HUTCHINGS.

[1884 M. 934.]

Mortgage—Sale—Interest—Mortgagee's Right to retain more than Six Years' Arrears—Statute of Limitations (3 & 4 *Will.* 4, *c.* 27), *s.* 42 [*Revised Ed. Statutes, vol. vii. p.* 396].

Sect. 42 of the *Statute of Limitations* (3 & 4 Will. 4, c. 27) does not affect the right of a mortgagee who has sold under his power of sale to retain out of the proceeds more than six years' arrears of interest.

After the judgment for the administration of the estate of a second mortgagee of real estate, the first mortgagees sold the mortgaged property under their power of sale and received the proceeds. A summons in the action was then taken out by the Plaintiff, a beneficiary under the will of the second mortgagee, to determine the question whether the first mortgagees were entitled to retain more than six years' arrears of interest. The first mortgagees were not parties to the action, but consented to appear on the summons to argue the question.

The second mortgage absorbed all the possible surplus of the proceeds of sale:—

Held, that the first mortgagees were entitled to retain more than six years' arrears of interest.

Edmunds v. *Waugh* (1) approved of.

ROBERT DUGDALE MARSHFIELD, a testator whose estate was being administered in the action under the judgment dated the 30th of January, 1885, was the second mortgagee of certain freehold premises in *Dorsetshire*. Subsequently to the judgment the first mortgagees, under the power of sale in their mortgage deed, sold the property and received the purchase-money. In the account furnished by them to the receiver appointed in the action, they claimed to retain out of the purchase-money, in addition to their principal and costs of sale, a sum equivalent to eight and a half years' arrears of interest.

The question raised on a summons by the Plaintiff, a beneficiary under the will, was whether the first mortgagees could retain more than six years' arrears of interest.

The first mortgagees were not parties to the action, but, on the Plaintiff's invitation, consented to come in and argue the point upon this summons.

(1) Law Rep. 1 Eq. 418.

KAY, J.
1887
In re MARSHFIELD.
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The mortgagor did not appear, as any possible surplus after satisfying the first mortgagees would be insufficient to satisfy the second mortgage.

W. Phipson Beale, for the Plaintiff:—

Upon the question whether a mortgagee who has sold under his power of sale can retain out of the proceeds more than six years' arrears of interest, the authorities are conflicting. In *Mason* v. *Broadbent* (1) Lord *Romilly* held that the mortgagee could not retain more than six years' arrears; but that decision was questioned by Vice-Chancellor *Kindersley* in *Edmunds* v. *Waugh* (2). I submit, however, that the former case should be followed rather than the latter. Lord *Romilly's* decision proceeds upon the footing that the mortgagor would, if he were seeking to redeem, be required to pay only six years' arrears (3). It has never been disputed that in a foreclosure action the mortgagee can, under sect. 42 of the *Statute of Limitations* (3 & 4 Will. 4, c. 27), only recover six years', and there is no sound reason why the same principle should not apply to a redemption action. *Edmunds* v. *Waugh* was a different case to *Mason* v. *Broadbent*, for the former case was a suit by the trustees and executors of the mortgagee to administer his estate, the proceeds of sale being paid into Court by them in their own suit.

[KAY, J., referred to *In re Stead's Mortgaged Estates* (4).]

There Vice-Chancellor *Malins* allowed only six years' arrears, distinguishing the case from *Edmunds* v. *Waugh*.

[KAY, J., referred to *In re Slater's Trusts* (5).]

That case is also in my favour.

E. Beaumont, for beneficiaries in the same interest.

R. F. Norton, for the Defendant, the executor and trustee of the will.

Church, for the mortgagees, was not called upon.

(1) 33 Beav. 296.
(2) Law Rep. 1 Eq. 418.
(3) 33 Beav. 301.
(4) 2 Ch. D. 713.
(5) 11 Ch. D. 227.

KAY, J.:—

I confess I am not able to resist the reasoning and logic of Vice-Chancellor *Kindersley* in *Edmunds* v. *Waugh* (1). In this case the second mortgagee of a certain real estate has died, and his estate is being administered in this action, The first mortgagees are not parties to this action, but they have sold the mortgaged estate under a power of sale. The executor of the second mortgagee in this action has induced the first mortgagees to appear on this summons in order that the question may be determined how many years' arrears of interest the first mortgagees are entitled to retain out of the proceeds of that sale. That short statement shews that the first mortgagees are not proceeding against the estate either by way of distress, or by way of action, or by way of suit. In fact they are not proceeding against the estate at all, but they are brought before the Court on a proceeding which, unless they submitted to it, would be irregular. But they submit to the jurisdiction in order to have the point decided whether, out of the moneys which have come to their hands through their having sold the mortgaged estate, these moneys being proceeds of the sale, they are entitled or not to retain more than six years' arrears of interest.

Now before the Act 3 & 4 Will. 4, c. 27, there is no doubt they would have been entitled to retain more than six years' arrears, or to recover more than six years'; but by sect. 42 of that Act it is provided that, after the 31st of December, 1833, "no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages, in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due." Thus far that section only limits the right of the mortgagee in the case in which he tries to recover his interest by distress, action, or suit: in every other case his right is not limited, but left as it was under the old law. Nobody can doubt that, under the old law, if he had sold the estate under his power of sale, he might satisfy himself more than six years' arrears of interest out of the

(1) Law Rep. 1 Eq. 418.

KAY, J.
1887
In re MARSHFIELD. MARSHFIELD *v.* HUTCHINGS.

money in his hands. This law does not seem to be affected by that section of the statute. In saying this I know I am only repeating in less effective words what was said by Vice-Chancellor *Kindersley* in *Edmunds* v. *Waugh* (1), where that learned Judge, after referring to Lord *Romilly's* decision in *Mason* v. *Broadbent* (2), thus expresses the law (3) :—"I am bound to say that, with all deference, I cannot concur in the conclusion that a bill by a mortgagor to recover the surplus money comes within the terms of the 42nd section as being a suit by which arrears of interest are sought to be recovered." This summons, if it can be treated as a suit at all, is not a suit by a mortgagee to recover his interest, but a suit against the mortgagee by a person standing in the same position as the mortgagor to recover the surplus of the proceeds of sale after satisfying the mortgage. Therefore the case falls exactly within the decision of Vice-Chancellor *Kindersley*, and I must hold that the first mortgagees have the right to retain more than six years' arrears of interest.

Solicitors: *Trollope & Winckworth; Munns & Longden; Prior, Church, & Adams.*

(1) Law Rep. 1 Eq. 418. (2) 33 Beav. 296.
(3) Law Rep. 1 Eq. 421.

G. I. F. C.

SHAFTO *v.* BOLCKOW, VAUGHAN, & Co.

CHITTY, J.

1887

Feb. 19, 21, 26.

[1885 S. 4533.]

Practice—Rules of Supreme Court, 1883, *Order* XXV., *r.* 4—*Striking out Pleading—Reasonable Cause of Action—Necessary Parties—Mining Lease—Lessor.*

In an action by a copyholder to restrain the working of coal under his land by *A.*, who claimed to be entitled to do the acts complained of by virtue of a lease from *B.*, the lord of the manor, *B.* was by amendment added as a Defendant, on the allegation that he claimed the right by himself and his lessees to work the coal; that he justified the acts of *A.*, and that he had received and claimed to be entitled to receive from *A.* rents and royalties in respect of such wrongful working.

On summons by *B.* under Rules of Supreme Court, 1883, Order XXV., r. 4, that the amended statement of claim might be struck out as against him on the ground that it disclosed no reasonable cause of action against him, and that the action might be dismissed as against him :—

Held, that the lessor had been properly added as a Defendant.

ADJOURNED SUMMONS.

The action was commenced in 1885 against *Bolckow, Vaughan, & Co.*, who are lessees from the Ecclesiastical Commissioners, lords of the manor of *Bondgate* in *Auckland*, of the minerals under copyhold lands of which Plaintiff is tenant on the rolls of the manor, for an injunction to restrain *Bolckow, Vaughan, & Co.*, from working coal and other minerals to the injury of the Plaintiff's lands.

In December, 1886, the writ was amended by adding the Ecclesiastical Commissioners as Defendants, and in January, 1887, an amended statement of claim was delivered, which contained an averment that the Ecclesiastical Commissioners alleged, contrary to the fact, that they were in right of the see, or as successors of the Bishops of *Durham*, and as lords of the manor, entitled by themselves and their lessees to get and work the coal and other minerals within and under the copyhold lands held of them as such successors.—"The Defendants the Ecclesiastical Commissioners in fact justify and approve the acts of the Defendants *Bolckow, Vaughan, & Co.* herein complained of, and allege that the latter Defendants as claiming under the said lease are and

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were entitled to commit the same, and have received and claim to be entitled to receive from the Defendants *Bolckow, Vaughan, & Co.* divers rents, royalties and wayleave dues for and in respect of coal so wrongfully worked, and the minerals, articles and things so wrongfully carried as aforesaid."

An injunction was claimed to restrain the Defendants respectively, their respective lessees, agents, servants, and workmen from entering upon and working the coal and other minerals within and under the Plaintiff's ancient copyholds without the consent of the Plaintiff, and damages; and in the alternative an injunction to restrain the working so as to let down or otherwise injure or interfere with the surface of such lands, and in either event damages for having so worked the coal under the copyholds as to let down and injure the surface.

This summons was thereupon taken out by the Ecclesiastical Commissioners (and now adjourned into Court), asking under Rules of Supreme Court, 1883, Order xxv., rule 4, that the amended statement of claim might be struck out as against them on the ground that it disclosed no reasonable cause of action against them, and that the action might be dismissed as against them.

Elton, Q.C., and *Blakesley*, in support of the summons.

Whitehorne, Q.C., and *J. G. Wood*, for the Plaintiff *contrà*:—

As lords of the manor and lessors claiming the right, and privy to and justifying the acts of their lessees under the lease, which was an authority from the lessors to the lessees to commit the acts complained of, the Ecclesiastical Commissioners are liable to the Plaintiff for the acts of their tenants: *Harris* v. *James* (1); *Powell* v. *Aiken* (2); *Doe* v. *Harlow* (3); and have been properly made parties to the action, which raises a question of the right to work mines under the copyholds of the manor, and could not have been determined in their absence: *Bell* v. *Wilson* (4); *Wakefield* v. *Duke of Buccleugh* (5).

In order to obtain an injunction against these Defendants it

(1) 45 L. J. (Q.B.) 545.
(2) 4 K. & J. 343.
(3) 12 A. & E. 40.
(4) Law Rep. 1 Ch. 303.
(5) Law Rep. 4 Eq. 613; 4 H. L. 377.

is not necessary that they should have actually entered and worked, if they claim and insist, for the purpose of profit to themselves, on the right of their tenants to do so: *Tipping* v. *Eckersley* (1); *Hext* v. *Gill* (2); *Goodson* v. *Richardson* (3). How, then, can it be said that "no reasonable cause of action" within the meaning of Order XXV., rule 4, is disclosed as against these Defendants so as to entitle them to an order striking out the amended statement of claim. It was not intended by that rule to preserve in another form demurrers, which had already been abolished by rule 1 of the same Order, but to provide an easy and summary mode of getting rid of actions manifestly groundless and frivolous: *Batthyany* v. *Walford* (4); *Metropolitan Bank* v. *Pooley* (5). The result of allowing the application will be that the Plaintiff will be altogether prevented from obtaining the discovery which is necessary for properly trying the question of right.

Elton, in reply:—

The Plaintiff is attempting by a side wind to obtain discovery from third parties who have nothing to do with the cause of action, and against whom no case for granting relief by injunction is shewn. Under the powers given by rule 4 of Order XXV. the Court will discourage such an attempt as vexatious: *Burstall* v. *Beyfus* (6). If the action sought to establish a custom generally in favour of the copyholders then the lord of the manor would be a proper party, but not to an action where it is sought to restrain an alleged improper course of working under the Plaintiff's land, to which the Ecclesiastical Commissioners have not been in any way parties.

CHITTY, J.:—

The Plaintiff claims an injunction in this action for the purpose of protecting his copyhold tenement against certain acts which are being done by the first Defendants, *Bolckow, Vaughan, & Co.*, and the statement of claim sets out that the Defendants doing

(1) 2 K. & J. 264.
(2) Law Rep. 7 Ch. 699.
(3) Ibid. 9 Ch. 221.
(4) 32 W. R. 379.
(5) 10 App. Cas. 210.
(6) 26 Ch. D. 35.

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these acts claim to be entitled to do them by virtue of a lease granted by the Ecclesiastical Commissioners. Then it sets out that the Defendants the Ecclesiastical Commissioners allege, contrary to the fact, &c. [His Lordship read the averment already set out in the statement of the case.]

On that statement of claim I am asked now, under Order XXV., rule 4, to order the pleading to be struck out on the ground that it discloses no reasonable cause of action against the Ecclesiastical Commissioners. As I have said before, I have some difficulty in putting the true interpretation on that rule. Demurrers are abolished by Order XXV., and it can hardly have been intended by rule 4 to set up again that which has been abolished by rule 1. The same rule relates to frivolous and vexatious actions, with regard to which, as has been said by Lord *Selborne* and other Judges, the Court formerly exercised what was considered to be an inherent jurisdiction. But the rule which is relied upon is, not that the pleading should be struck out on the ground that it discloses no cause of action—which would be the simplest way of restoring a demurrer—but no "reasonable cause of action," and some meaning must be given to the word "reasonable." I find a difficulty, as I said before, in ascertaining exactly what kind of cause is meant to be covered by the terms of the earlier part of the rule. With regard to the latter part of the rule of course there is no difficulty at all. The former and the latter part of the rule are quite distinct.

Now it appears that the substance of the statement of claim is that the Ecclesiastical Commissioners, as landlords, claim the right to do by themselves or their lessees all the acts complained of; and they are interested in the subject-matter therefore of the action, and they claim a right. It would be most inconvenient, if that is the real meaning of the statement of claim, and I think it is, to try a question of right of such magnitude in the absence of the Ecclesiastical Commissioners, and I think the Plaintiff was justified in making them Defendants on the ground of the large interest that they had in the matter of the suit. But on another ground I think they are properly made Defendants, which is this—that they do claim in substance the right to do these things. As was said, though not for the first time, in *Hext* v.

Gill (1), and there laid down, where persons claim to have the right to do a thing, even though saying they have no present intention of doing it, they are proper parties to a bill for a declaration of right and for an injunction. So also in *Tipping* v. *Eckersley* (2) Vice-Chancellor *Wood* says that if the defendant claims and insists on the right to do a thing, although he has not already done it *modo et formâ*, as alleged, he would be a proper party to the suit, and against him he (the Vice-Chancellor) should have no difficulty in granting an injunction. I have always understood it to be the settled practice that when a person claims a right, that is a ground for making him a party to an action for an injunction. At any rate I think in this case that there are quite sufficient statements to shew that there is the claim of right; there is the wrong being done, and the Defendants, the Ecclesiastical Commissioners, are on the statement of claim taking profit with respect to the wrong done. Therefore I refuse the summons.

Solicitors: *White, Borrett & Co.*; *Harvey & Capron.*

(1) Law Rep. 7 Ch. 699, 711. (2) 2 K. & J. 264, 270.

F. G. A. W.

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HOPE *v.* CROYDON AND NORWOOD TRAMWAYS COMPANY.

[1887 H. 357.]

Debenture—Public Undertaking—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *s.* 41 [*Revised Ed. Statutes, vol. ix., p.* 572]—*Judgment—Receiver.*

In an action by a debenture holder on behalf of himself and the other holders of an issue of £15,000 debentures, the Court declared that the holders of that issue were entitled to stand in the position of judgment creditors for £15,000, and appointed a receiver of the property of the company subject to be seized by a judgment creditor.

THE *Croydon Tramways Company* was incorporated by an Act of 1878. The Plaintiff, *H. K. Hope*, was the holder of mortgage debentures for £1400, part of a series of £15,000 issued under that Act, secured on the undertaking and tolls and sums of money arising by virtue of the *Companies Act*, in form given in Schedule C. to the *Companies Clauses Consolidation Act*, 1845.

The *Norwood District Tramways Company* was incorporated by an Act of 1882. By a third Act passed, in 1883, the *Croydon Tramways Company* and the *Norwood District Tramways Company* were dissolved, and the members of those companies became members of a new company incorporated under the name of the *Croydon and Norwood Tramways Company*, and the debentures issued under the *Croydon Tramways Act*, 1878, were charged on the undertaking and tolls of the new company, and sums of money arising by virtue of their Act, also in the form provided by the *Companies Clauses Consolidation Act*, 1845, which was incorporated with each of the special Acts.

Thomas Grover, the holder of debentures of a set issued under the provisions of the *Croydon and Norwood Tramways Act*, 1883, brought an action on behalf of himself and all the other debenture holders of that issue, and in that action *W. F. C. Wain* was appointed receiver and manager of the property and undertaking of the company.

The Plaintiff, *H. K. Hope*, subsequently brought this action on

behalf of himself and the other holders of debentures of the £15,000 issue against the company, and *Grover*, the Plaintiff in the other action. And by an order made in both actions dated the 4th of February, 1887, *W. F. C. Wain* was appointed receiver and manager in both actions. There was a contest as to the priority of the several issues of debentures. The action was brought on on motion for judgment on the pleadings.

Cookson, Q.C., and *Bradford*, for the Plaintiff:—

In addition to inquiries and directions necessary to work out the rights of the several debenture holders, the Plaintiff asks for a personal judgment for £15,000 on the Defendant company in order that the debenture holders of this issue may avail themselves of any property that may not be included in their security. There may be such property: *Gardner* v. *London Chatham and Dover Railway Company* (1); and if so it is liable to be seized by some other creditor who gets a judgment. It is desirable to have a personal judgment for the whole £15,000, instead of the amount of the Plaintiff's debt, as was the case in *Bowen* v. *Brecon Railway Company* (2); and we ask also that the existing receiver may be appointed receiver of what can be got in under the judgment and is not the subject of the debentures.

Theobald, for the Company.

Barlow, for the Defendant *Grover*.

NORTH, J.:—

There is a difficulty in giving a judgment in this action in common form for the £15,000: as the sole Plaintiff is creditor for £1400 only: or in giving him judgment for £1400, as that would be putting him in a better position than the other debenture holders on whose behalf he sues. Nor do I think that to give the Plaintiff judgment for £1400, to be held for the benefit of all the debenture holders, as suggested, would meet the justice of the case. But I am prepared to declare that the debenture holders are entitled to stand in the position of judgment creditors for the sum of £15,000 and interest now due, and thereupon

(1) Law Rep. 2 Ch. 201. (2) Law Rep. 3 Eq. 541.

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appoint the existing receiver to be receiver of all the property of the Defendants not included in the previous order for the appointment of a receiver of the property charged by the debentures.

Solicitors: *Walter Webb & Co.*; *Sutton & Ommanney.*

D. P.

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In re JACKSON. SMITH *v.* SIBTHORPE.

[1885 J. 1804.]

Mortgage Debt—Mortgage in joint Names of several Persons—Joint Tenancy or Tenancy in Common—Joint Account Clause.

Mortgages in fee were taken in the names of three sisters as joint tenants, each of the deeds containing a clause by which it was declared that the mortgage money belonged to the mortgagees on a joint account in equity as well as at law. The money advanced on the security of the mortgages formed part of the proceeds of the estate of a brother, to which the three sisters were, under his will, entitled as tenants in common. Having regard to this fact and the other facts in evidence:—

Held, that notwithstanding the insertion of the joint account clause the mortgagees were entitled to the mortgage money as tenants in common.

SUMMONS to vary the Chief Clerk's certificate.

The action was brought to administer the estate of *Faith Jackson*, a maiden lady, who died on the 5th of December, 1884. The Plaintiffs were the executors of her will; the Defendants were the *Lincoln County Hospital* (to which she had bequeathed a legacy) and the treasurer of the hospital. She and her two sisters, *Elizabeth Jackson* and *Sarah Jackson*, had lived with a brother, who died in the year 1865, and they continued to live together after his death. By his will he devised and bequeathed all his residuary estate, real and personal, to his three sisters in equal shares, as tenants in common. His property consisted mainly of real estate, the greater part of which was sold after his death, and the proceeds of sale were from time to time invested on the security of mortgages of real estate, which were taken in the names of the three sisters as joint tenants, and in each of the deeds there was a joint account clause in the

ordinary form, by which it was declared that the mortgage money belonged to the mortgagees on a joint account in equity as well as at law, and that they, and the survivors and survivor of them, should remain entitled in equity as well as at law to the mortgage money and the interest, and that the receipt of the survivors or survivor of them, or of the executors or administrators of such survivor, or their or his assigns, should be an effectual discharge for the same and every part thereof respectively. *Elizabeth Jackson* died on the 24th of July, 1881, having by her will devised her real estate (if any) and bequeathed the residue of her personal estate to trustees, upon trust to permit her sisters *Faith* and *Sarah* to receive the income thereof during their joint lives, and to the survivor during her life, and after the death of the survivor upon trust to pay certain pecuniary legacies. *Faith Jackson* died, as already stated, on the 5th of December, 1884, having by her will, executed in September, 1882, devised and bequeathed all her real and personal property to trustees, upon trust to pay the income thereof to her sister, *Sarah Jackson*, during her life, and after her death (subject to the payment of certain legacies) upon trust as *Sarah Jackson* should by will appoint, and, in default of appointment, she devised and bequeathed the same to *Sarah Jackson* absolutely. *Sarah Jackson* died on the 25th of August, 1885. The Plaintiffs were also the executors of her will. After her death the question arose whether she, as the survivor of the three sisters, was entitled to the whole of the mortgage debts, or whether the estate of *Faith Jackson* was entitled to a third part of them. The Chief Clerk, by his certificate, found that the estate of *Faith Jackson* was not entitled to any part of the mortgage debts.

The present summons was taken out by some of the legatees under the will of *Faith Jackson*. Unless she was entitled to one-third of the mortgage debts there were no assets to satisfy the legacies which she had bequeathed.

Mr. *George Wileman*, who had been from 1863 to March, 1875, managing conveyancing clerk to Mr. *Tweed* (who had been the solicitor to the three ladies), and who had lived on terms of great intimacy with them, gave evidence to the following effect:—

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Faith Jackson managed all the financial affairs of the family. Out of the proceeds of the sale of the testator's real estate a sum of £800 was lent on a mortgage in the name of *Sarah Jackson* alone, the three sisters contemplating at that time keeping their respective moneys entirely separate, but, as moneys were not forthcoming for the aggregate of their three shares, they determined to treat that and every other investment as a part of the whole fund to which they would continue to be entitled as tenants in common. The next investment was of a sum of £2400 on a mortgage given by a Mr. *Kennington*. *Wileman* prepared that mortgage. *Tweed* acted in that matter as solicitor for both the mortgagor and the mortgagees. No special instructions were received from the ladies as to the form of the mortgages in any of the cases. *Wileman* said that in each case he treated the advance as a joint one, and inserted a joint account clause in the mortgage deed in order to facilitate any subsequent dealing with or discharge of the mortgage debt and security, and not with the object of vesting the beneficial interest in the surviving sisters or sister to the exclusion of the predeceasing sister or sisters.

On the 18th of October, 1879, *Wileman* attended at the house of the three ladies at their request, and took instructions from them for their respective wills. They were all present in a room together, and each heard the instructions given to him by the others. On that occasion the sisters *Faith* and *Elizabeth* respectively stated that they were worth a little short of £4000, but that *Sarah* was £500 better off in consequence of an uncle having left her £500. *Wileman* was appointed an executor of each of the three wills. The will which he then drew for *Elizabeth* was that which was proved after her death. The other two sisters after her death revoked the wills which were then drawn by him and executed by them, and made new wills. All the three wills which he drew were in the same form *mutatis mutandis*. On the 21st of September, 1881, after the death of *Elizabeth*, he called on the two surviving sisters with the view of obtaining an accurate account of the personalty belonging to *Elizabeth*, in order that he might prepare the executors' affidavit for the purpose of proving her will. On that occasion he had a discussion with *Faith* and *Sarah Jackson* as to how the probate, legacy, and other duties

and expenses in connection with *Elizabeth's* estate should be paid, and *Faith*, with the concurrence of *Sarah*, stated that she and her sister would prefer that none of the investments should for the present be called in, but would rather pay all the duties and expenses out of their own moneys. In accordance with the information supplied to him by *Faith* and *Sarah*, and with their concurrence and assistance, he prepared the affidavit for probate and the residuary account, in which account the estate of *Elizabeth* was computed and stated to consist (*inter alia*) of one-third share of the principal moneys secured by the mortgages, amounting altogether to £3483 6*s.* 8*d.* The sum payable for probate duty and Court fees in respect of *Elizabeth's* estate, amounting to £113 16*s.*, was paid by *Faith* and *Sarah* out of their own moneys, and they also paid the legacy and succession duties payable in respect of *Elizabeth's* estate, amounting to £13 13*s.* 3*d.* and £4 6*s.* 3*d.* respectively, and all the executorship and other expenses connected with her estate.

Mr. *J. G. Dashper*, who became a managing conveyancing clerk to Mr. *Tweed* in 1874, deposed that in October, 1874, he prepared a mortgage for £2000 from *John Mackinder* to the three ladies. In preparing that mortgage he referred to the mortgages previously executed to them, and followed the form of those mortgages, causing the mortgaged property to be conveyed to the three ladies as joint tenants, and inserting a joint account clause. He considered it his duty to explain to them the effect of the mortgage being taken in their joint names, and for that purpose he, in January, 1875, called on them at their house, and read to the three sisters together the joint account clause, and explained to them that the effect of the mortgage being taken in their joint names would be, that, on the death of any one of them, the survivors would become entitled to the amount due on the mortgage, and, on the death of any two of them, the survivor would become entitled to the whole. They expressed themselves satisfied with this explanation. His reason for specially explaining the mortgage deed to them was, that it struck him as peculiar that the mortgages previously taken should have been made to them as joint tenants, knowing, as he did, that the money advanced was not trust money. He prepared other deeds for

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them subsequently in the same form, but none after the death of *Elizabeth*. The effect of his cross-examination is stated in the judgment of the Court.

Cozens-Hardy, Q.C., and *J. W. Baines*, for the summons :—

Notwithstanding the insertion of the joint account clause, the three sisters were in equity entitled to the mortgage debts as tenants in common, not as joint tenants. As a general rule, when money is invested by two or more persons in the purchase of property in equal shares, and the matter on the face of it purports to be a joint tenancy, a Court of Equity considers it to be a joint tenancy. But, in the case of an investment on mortgage, the presumption is in favour of a tenancy in common: *Robinson* v. *Preston* (1); *Petty* v. *Styward* (2). In either case the Court would have regard to the source whence the money was derived, and here the sisters were clearly tenants in common of the property which they took under the will of their brother. The joint account clause is mere conveyancing machinery, its object being only to facilitate the dealing with the property, and, though a purchaser may not be entitled to go behind it, it is not conclusively binding on the persons interested in the money: *In re Harman and Uxbridge and Rickmansworth Railway Company* (3). Sect. 61 of the *Conveyancing Act*, 1881, which deals with the effect of a joint account clause in a mortgage, only provides that the mortgage money shall be deemed to be and remain money belonging to the mortgagees on a joint account "as *between them and the mortgagor*." There is nothing in the joint account clause, or in the other circumstances which are in evidence, to rebut the presumption of law that where money is advanced by several persons on mortgage, whether in equal or unequal shares, they are tenants in common of the money. Indeed, the circumstances of the present case shew clearly that this was the intention of the three sisters.

Farwell, for the *Lincoln County Hospital* :—

The question is one of intention, and the Court is entitled

(1) 4 K. & J. 505, 511. (2) 1 Rep. in Chan. 31.
(3) 24 Ch. D. 720.

to look at the surrounding circumstances and the subsequent acts of the parties: *Harrison* v. *Barton* (1). The evidence of Mr. *Wileman* as to what took place on the occasion when he received instructions from the three sisters for their wills, as well as the provisions of those wills, are conclusive in favour of a tenancy in common.

Napier Higgins, Q.C., and *Dundas Gardiner*, for the Plaintiffs:—

The evidence is not sufficient to displace the conclusion which is to be derived from the mortgage deeds themselves, that the three sisters were interested in the mortgage money as joint tenants. It is clear that on one occasion at least the effect of the joint account clause was explained to them, and that they assented to it.

NORTH, J. (after stating the facts, continued):—

It is clear that if the joint account clause had not been inserted in the mortgages, the three sisters would have been tenants in common of the mortgage moneys. That is settled law. The Chief Clerk was of opinion that the joint account clause amounted to a declaration that there was to be a joint tenancy in the money, and that it negatived the presumption in favour of a tenancy in common, which would otherwise have existed. Various circumstances are relied upon as shewing conclusively that there was really a tenancy in common. The fact that the money originally belonged to the three sisters separately, not jointly, is a strong circumstance, as is also the fact that the mortgages were consolidated mortgages, so to speak. It is clear that no specific instructions were given by the ladies when the mortgages were prepared as to the form which they should take, and, on the first occasion on which a mortgage was made in the joint names, the gentleman who acted for the ladies was also the solicitor for the mortgagor, and it would obviously facilitate dealing with the property, in case the mortgage should be paid off, that there should be a joint account clause, so that a receipt for the mortgage money might be given by the survivors or survivor of the mortgagees, without the necessity for the concurrence

(1) 1 J. & H. 287.

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of the representatives of a deceased mortgagee. From that time onwards the same form of mortgage deed was adopted, and there is nothing to remark with respect to any of these subsequent transactions, except on the occasion when Mr. *Dashper* had an interview with the ladies. Passing that over for the moment, we have this, that the mortgages were prepared in this form, not at the instance of the ladies or their advisers, but apparently because it was the most convenient form for the mortgagor.

In October, 1879, Mr. *Wileman* was consulted by the ladies about their wills, and his evidence is clear and distinct as to what took place on that occasion. It appears that they calculated what the amount of their property was, what the property of each of them was, and that each of them then proceeded to mould the legacies which she bequeathed with reference to the amount of the property which she had at her disposal. This was the result of a common conference at which all the three sisters were present, and each of them proceeded to dispose of her property in a way which was consistent only with their being tenants in common of the mortgage moneys, because there is no reason to suppose that any one of them at that time contemplated any right which she might have in the property of the others, and, if they were joint tenants of the mortgage moneys and not tenants in common, the legacies given by the wills of the two sisters who would predecease the third must have failed to a great extent, though probably not entirely. And, when the two survivors made fresh wills after the death of *Elizabeth*, they again made them upon the footing that what they could dispose of was two-thirds of the mortgage moneys, and not the entirety.

After the death of *Elizabeth* in 1881, Mr. *Wileman*, who was one of her executors, saw the two surviving sisters, and they with him went very fully and carefully into the state of their property. It was calculated what the value of the share of the deceased sister was, and what the values of the shares of the survivors were, and a sketch was made on a piece of paper, which has been preserved, which piece of paper, as the evidence shews, was in the hands of the sister *Faith*, and was checked by her as the executor went through the documents to ascertain the position of the parties. I do not know whether *Faith* was the most

vigorous in intellect of the three sisters, but she at any rate was the one to whom the others left the ostensible management of the property. She, according to the evidence, was the best arithmetician of the three. She had in her hand this paper, which is clear and perfectly intelligible, and fully confirms the evidence of Mr. *Wileman* as to what took place. On that paper the aggregate property of the three sisters is estimated. The paper is headed, "Miss *Elizabeth Jackson*," shewing that they were calculating her share. It begins, "One-third of the furniture, wearing apparel," &c., so much. Then comes a list of money out on mortgage, making a total of £10,450. Then one-third, £3483 6*s.* 8*d.*, is taken from that. Below that is added for interest £56 14*s.* 7*d.*, and the aggregate of those two sums is the amount which in the residuary account, which was passed shortly afterwards of *Elizabeth's* estate, is inserted as the amount due to her on mortgage. Then, on the other side, there is a list of the legacies given by *Elizabeth*, which amount to £3300, a sum very near to the £3483, the amount of her property, and that tallies exactly with the remark, which is said by Mr. *Wileman* to have been made at the time by *Faith*, that *Elizabeth* had calculated very nicely the amount of her share of the property. That is the strongest possible evidence against *Faith*. If the joint tenancy theory was the right one, she might then have claimed one moiety of what *Elizabeth* had dealt with as her estate; but, on the contrary, she acted on the view that she was only entitled to a third of the whole property. I should add that *Faith* and *Sarah*, the two survivors, acted on the will of *Elizabeth*, dealing with the one-third as her own, and paid probate and legacy duties and other charges and expenses, upon the footing that her will was a good disposition of her one-third. That is entirely consistent with, and only consistent with, its being the common intention of the three sisters that the joint account clause which was inserted in the mortgage deeds should not in any way alter the tenancy in common; which was clearly the intention of the parties in making the investments, unless that clause altered their position. Now, that being very strong evidence as against *Faith* at that time, it seems to me to be also very strong evidence to shew, not only what the position of *Elizabeth* was as regards

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her share, but also what the position of all the three sisters was with respect to their shares, and I cannot come to the conclusion that *Elizabeth* was a tenant in common without necessarily coming to the conclusion that there was a tenancy in common as regards *Faith* and *Sarah* also.

It is said that there is something inconsistent with this in what took place in 1875, when Mr. *Dashper*, who had then prepared one of the mortgages, following the form previously adopted, saw the three sisters, and had some conversation with them about the joint account clause. Mr. *Dashper* says that, this being the first mortgage which he had prepared, he followed the form adopted in the previous mortgages, but he says that he considered it his duty to explain to the ladies the effect of the mortgage being taken in the joint names, and that he accordingly told them that the effect would be that, on the death of one of them, the survivors would become entitled to the whole amount due on the mortgage, and that on the death of any two of them the survivor would become entitled to the whole, and that they expressed themselves satisfied with this explanation. Then he says that his reason for giving this explanation was, that it struck him as peculiar that the previous mortgages should have been made to the three sisters as joint tenants, knowing, as he did, that the money advanced was not trust money. The words used by Mr. *Dashper* may have referred solely to the legal interest, so to speak, and not to the beneficial interest, and a legal interest as joint tenants would be quite consistent with a beneficial tenancy in common. But Mr. *Dashper* was speaking some eleven years after the conversation took place, and no doubt, according to his recollection, no distinction was made between the legal and the beneficial interest. In cross-examination he said that the mortgage, the draft of which he prepared, was executed in October, 1874, and that it was not until the following January that he saw the ladies and took the documents to them. Then when he was asked to state exactly what passed, he said: "As far as I remember I said, 'I have brought you Mr. *Mackinder's* mortgage deed.' I opened the parcel, took out the mortgage, told them what amount was invested, what properties were comprised in the mortgage, the rate of interest, and when it was payable. I then said, 'These

moneys belong to you,' and I believe I then read the joint account clause through to them, and, as they were apparently aged and infirm, I went on to explain to them the effect of the clause. I said, 'The money is advanced on a joint account, so that on the death of one it will go to the survivors, and on the death of any two of you to the survivor.' I said, 'Is that right?' and I believe *Faith* answered, 'Yes, that is right,' and the other sisters gave their assent. I think one of the other sisters said, 'Yes,' and the other nodded assent. *Faith* was the chief spokeswoman throughout." Then he was asked, "Do you think that, the ladies being, as you say, aged and infirm, the other two sisters besides *Faith* understood?" He answered, "I should think they did. Till *Faith* spoke neither of them said anything." Although he does not mention it, I have no doubt he did tell them then that the mortgage did not differ in form from the prior mortgages. Nothing, however, was done upon this. The ladies were not being consulted as to what should be done. They were simply asked whether they were satisfied with the joint account clause, and (accepting the evidence implicitly), they said that they were; the mortgage being in the same form as the other mortgages. That is the effect of Mr. *Dashper's* evidence, and although it was evidence properly put forward, yet it seems to me that it goes for nothing as compared with the strong evidence of what passed afterwards, to which I have already referred, and about which there can be no dispute. Under these circumstances it seems to me that the insertion of the joint account clause is wholly insufficient to alter what otherwise would have been the effect of the mortgages, standing alone, viz., that the three sisters would have been tenants in common of the mortgage debts. I therefore hold that they were tenants in common, and the certificate as regards the amount of *Faith's* property must be varied accordingly.

Solicitors: *Watney, Tilleard, & Freeman; Paterson, Snow, & Co.; Greenfield & Cracknall.*

W. L. C.

NORTH, J.
1887
Feb. 24.

In re HARTLEY.
STEDMAN *v.* DUNSTER.

[1884 H. 1350.]

Will—Construction—Condition Precedent—Administration Order.

A testator bequeathed his residuary personal estate to such persons who should within one year from his death establish their right or title thereto as his next of kin, with a gift over in default. An order for limited administration, including an inquiry as to next of kin, was made on summons shortly after the testator's death. The persons who were next of kin did not bring in a claim within the year:—

Held, that the gift over took effect.

Tollner v. *Marriott* (1) distinguished.

LEONARD LAURIE HARTLEY made his will, dated the 11th of July, 1883, containing the following residuary gift:—

"I give, devise, and bequeath all the residue of my property wheresoever, both real and personal, unto such person or persons who shall within one year from my death establish his, her, or their right or title thereto, either as my heir-at-law or as my next of kin, according to the statute for the distribution of the personal estate of intestates, and in default thereof, and in case of my not making any other disposition of my said residuary estate, or any part thereof, by any subsequent will or codicil, or otherwise, then I give, devise, and bequeath, all the said residue of my property whatsoever and wheresoever, both real and personal, unto and to be equally divided between and amongst the several persons hereinbefore named and described as legatees under this my will, as well specific as pecuniary."

The legatees so named were *Alfred Sherwood Stedman*, his manservant and personal attendant, his two executors, *William Hilliard Dunster* and *William Blackman Dunster*, and Dr. *Bagshaw*. The testator made a codicil, dated the 13th of December, 1883, whereby he revoked the contingent gift and bequest contained in his will of his residuary real and personal estate in favour of Dr. *Bagshaw*, and directed "that any share and interest

(1) 4 Sim. 19.

therein which might, under the terms of the said last-mentioned gift and bequest devolve upon the said Dr. *Bagshaw*, shall belong exclusively to the several other legatees in my said will named, as well specific as pecuniary, to the exclusion of the said Dr. *Bagshaw*."

The testator died on the 27th of December, 1883. His will was proved on the 5th of April, 1884.

On the 17th of May, 1884, an order was made on an administration summons in Chambers that inquiries should be made—(1) as to the personal estate of the testator not specifically devised; (2) as to debts, funeral expenses, and legacies of the testator unpaid; (3) as to his real estate; (4) as to advances made by him in respect of an estate of which he was tenant for life; (5) as to the purchase of a specified house by the testator; (6) an inquiry in common form who were the heir-at-law and next of kin of the testator.

It was found that the testator had no real estate, and the inquiry as to the heir-at-law was not prosecuted. In prosecuting the inquiry as to next of kin, advertisements were issued, and several persons within a year of the testator's death made claims to be his next of kin; and some of such claimants proved they were related to the testator in the ninth degree. Pedigrees were brought in by such claimants within the year indicating the relationship of a number of persons to the testator, some of whom were and some were not, therein stated to be dead. Among the names of persons so mentioned in two of the pedigrees were *Anne* and *Henry*, the children of Major *Bunbury*, and among the names of persons nearer in kinship to the testator than the children of Major *Bunbury* were some who were not stated to be dead. The Chief Clerk found that *Anne Elizabeth Vesturme*, widow, and *Henry William Bunbury*, who were the children of Major *Bunbury*, were the testator's sole next of kin living at his death. They were the third cousins of the testator, and therefore related to him in the eighth degree; they were not acquainted with the existence of the testator's will, and did not make any claim within a year from his death.

On the 20th of March, 1885, Mr. Justice *Pearson* made an order that in addition to the accounts and inquiries directed by

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the order of the 17th of May, 1884, an inquiry should be made whether any and what person or persons had within one year from the testator's death established his, her, or their right or title to the testator's residuary real and personal estate, either as the testator's heir-at-law or as his next of kin according to the statute.

The Chief Clerk found that no person had established such right or title. A summons was taken out on the part of *Anne Elizabeth Vesturme* and *Henry William Bunbury* to vary the certificate by finding that they had established their right within the year from the testator's death.

Cozens-Hardy, Q.C., and *Chadwyck Healey*, for the *Bunbury* claimants:—

It is not necessary that the claim should have been adjudicated upon within the year, provided there has been tendered sufficient proof, or, as we submit, what would lead to proof, of such claim; in which case the right is to be considered as established. In this case pedigrees were carried in which would lead to the establishment of who were the next of kin: though these pedigrees were brought in by other parties their effect is the same as if they had been brought in by the next of kin themselves.

In the second place, the effect of taking out the administration summons and getting an order made upon it, is equivalent to a claim by the next of kin though the next of kin was no party to the proceedings: *Franco* v. *Alvares* (1); *Tollner* v. *Marriott* (2).

[NORTH, J:—I only call on the other side on the case of *Tollner* v. *Marriott*.]

Cookson, Q.C., and *Dyne*, for the Plaintiff, and *Rigby*, Q.C., and *Maidlow*, for the Executors:—

Tollner v. *Marriott* is in some respects differently reported in the *Law Journal* (3); if the case can be relied on as authority it does not govern the present. The nature of the administration proceedings were different, and the words of the will were different; in this case the persons described as legatees are such

(1) 3 Atk. 342. (2) 4 Sim. 19.
(3) 9 L. J. (Ch.) 14.

persons as shall establish their right within a period, and unless persons have done that they are not within the description of the legatees given by the testator; in that case the testator described the legatees, and added a condition to their taking; it was held that the condition was performed by the institution of the suit.

Cozens-Hardy, in reply.

NORTH, J.:—

The Chief Clerk has found that no person has established a right or title to the testator's personal estate as his next of kin within a year from his death. The *Bunbury* claimants seek to have the certificate varied by finding that they did so establish their right. It appears on the certificate that they are the testator's next of kin. The question is, therefore, whether they established their right within the year. In the first place, as matter of fact, in my opinion they did not. It is impossible to say that they established their right within a year, when in point of fact a year had elapsed before they knew of the will, and they did not and could not carry in any claim within that time, and therefore did not establish their claim. It is suggested that the carrying in a pedigree operated as a claim by them. It was not carried in by them at all. It was carried in by a different person altogether. The pedigree does not in itself establish their right. It does not even shew that they are next of kin. If there was nothing before the Court besides that it would rather shew they were not next of kin, for the names of other persons in a nearer degree of kinship to the testator appeared in the pedigree; and some of them appeared to have been alive, as they were not stated to be dead.

But another point raised was that, whether the right was or not established within the year did not matter, because on the 17th of May, 1884, the Court had taken on itself the administration of the estate; and that it was not necessary after that to establish the right, or, in other words, to comply with the will. It seems to me the point to be decided is one of fact—who are the legatees named? The legatees are such persons as shall within a year of the testator's death establish their right as next

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of kin. It seems to me impossible to leave out the words, "who shall establish their right within a year." But it is said that the case is settled by authority, and that is the only point I felt any difficulty about. There are the two cases of *Franco* v. *Alvares* (1), and *Tollner* v. *Marriott* (2), which it is said shew that when once the administration order was made the time within which the claim was brought in was not necessary to be considered. The case of *Franco* v. *Alvares* is not so near this case, and may be left out of consideration. In *Tollner* v. *Marriott* the testator gave "to each of the sons and daughters of his sisters *Sarah* and *Elizabeth Rooney* who should be living at his decease £100, to be paid to them in *London*, or remitted to them in *Dublin*, provided they should claim the same within five years from the day of his decease, by a writing under their hands, and delivered to his executors, and not otherwise." As a matter of fact it would appear that there were some legatees who had claimed within the five years, and it appears from the report in the *Law Journal* that after a decree had been made a claim had gone before the Master and the Master had made his report, and the application was for the purpose of reviewing the Master's decision. The effect of both reports is that the Vice-Chancellor decided that though no claim had been made out to one of the legacies within five years there were what was equivalent to a claim by reason of a general administration suit. He says: "It has been admitted, as a fact, that there was a bill filed within five years after the testator's death, for the purpose of administering the assets of the testator. In the case of *Franco* v. *Alvares*, where the testator had directed that certain benefits should be given to his son's creditors, provided they gave his son a release within four months; and, two days before the expiration of the four months, a bill was filed, by some of them, on behalf of all of them, for the purpose of having the benefits intended by the will, Lord *Hardwicke* held that that was a sufficient compliance with the condition. It appears to me, therefore"—the "therefore" seems a long step—"It appears to me, therefore, that it must be considered, according to the authority of that case, that a bill filed for the administration of all the estate, and for the payment

(1) 3 Atk. 342. (2) 4 Sim. 19.

of all the legacies, must be taken as equivalent to a demand, by each of the legatees, for his legacy." That seems to differ from the present case in these respects. In the first place, I do not see my way to construe this will as the Vice-Chancellor construed the will in that case, because I should have to say that the condition imposed on the next of kin of establishing their rights within a year was of no importance, and I cannot see how that requirement can be got rid of by any judgment for the administration of the estate. In the next place there is this difference. The learned Judge proceeded on the fact that a general decree had been made for the administration of the estate. That is not the case here. The parties have taken advantage of a mode of proceeding which enables them to do without a general administration decree, and have adopted proceedings by which the Court can deal with questions which arise in administering the trusts of the will without administering the trusts generally. Therefore whatever the effect of a general administration decree would have been, it has no application to the present case.

On these grounds I feel I am in no way fettered by the decision in *Tollner* v. *Marriott* (1), and I come to the conclusion that the Chief Clerk was right in the view that he took.

Solicitors: *Sharpe, Parkers, Pritchard, & Sharpe,* agents for *Knocker, Dover; A. M. Smith; Dawes & Sons.*

(1) 4 Sim. 19.

D. P.

STIRLING, J.

1886

Dec. 2.

VERNON *v.* HALLAM.

[1886 V. 616.]

Sale of Business and Goodwill—Covenant by Vendor not to carry on Business under his Name for a term of Years—Breach of Covenant—Restraint of Trade—Injunction.

A covenant by a vendor of a business and the goodwill thereof, that he would not for a term of years carry on the business of a manufacturer either by himself or jointly with any other person under the name or style of *J. H.*, or *H. Brothers*, the name of the business which he had sold, is not a covenant that the vendor would not carry on business as a manufacturer, but against using a particular name or style in trade, and an injunction was granted to restrain a breach of the covenant.

Where a vendor sold his business and commenced a similar business in the same locality and solicited customers of the old house to deal with him, the Court, following the decision in *Pearson* v. *Pearson* (1), and being of opinion that the case of *Labouchere* v. *Dawson* (2) had been overruled by the decision in that case, refused to grant an injunction to restrain such solicitation.

MOTION.

On the 22nd of May, 1884, *John Hallam*, the Defendant, for valuable consideration assigned to *Jabez Vernon*, certain fixtures, stock in trade, machinery, and all that the goodwill, and interest of him in the business of a hackle pin and wire manufacturer as the same was then carried on by him under the name of *John Hallam*, or *Hallam Brothers*, at *Butterthwaite Works*, and in any subsidiary trade or trades, business or businesses, carried on by him after in the said premises in connection with the said business of a hackle pin and wire manufacturer, and the full benefit and advantage thereof, and with the use of the name or style of *Hallam Brothers*, and all and every the book debts owing to the said *John Hallam*, or *Hallam Brothers*. The indenture contained the following covenant: "The said *John Hallam* doth hereby covenant with the said *Jabez Vernon*, that he the said *John Hallam* will not without the consent of the said *Jabez Vernon*, for the space of five years from the date hereof, carry on the business of a manufacturer, either by himself or jointly with any other person

(1) 27 Ch. D. 145. (2) Law Rep. 13 Eq. 322.

or persons under the said name or style of *John Hallam*, or *Hallam Brothers*."

On the 20th of March, 1886, *Jabez Vernon* died intestate, and letters of administration were granted to his daughter, *Fanny Vernon*, the Plaintiff. *John Hallam* commenced business at 7, *Westfield Terrace, Sheffield*, and did certain things in breach, as alleged, of his covenant, and the Plaintiff issued a writ in an action against him in which she claimed an injunction to restrain him from carrying on the business of a manufacturer, either by himself or jointly with any other person or persons under the name or style of *John Hallam*, or *Hallam Brothers*, until the expiration of five years from the 22nd day of May, 1884; and from issuing or circulating, or causing to be issued or circulated any circulars, advertisements, or notices representing, or so contrived or expressed as to represent that any business carried on by him at 7, *Westfield Terrace, Sheffield*, or elsewhere was a continuation of or connected with the business lately carried on by the said *Jabez Vernon*, and then carried on by the Plaintiff as his administratrix at *Butterthwaite Wire Mills;* and to restrain the Defendant, his servants or agents from applying to any person who was a customer of the said *Jabez Vernon*, or of the Plaintiff as such administratrix, either privately, by letter, personally, or by a traveller asking such customer to deal with the Defendant or to discontinue to deal with the Plaintiff, or to address communications intended for the firm of *Hallam Brothers* to the Defendants works at *Westfield Terrace* aforesaid.

This was a motion on behalf of the Plaintiff for an injunction as claimed by the writ. The Plaintiff's affidavits shewed that the Defendant had committed the acts complained of, and to prevent the continuance of them an injunction was asked for.

J. G. Wood, and *Manby*, for the Plaintiff:—

It is submitted that the Defendant has committed a breach of his covenant in several respects, and that the Plaintiff is entitled to an injunction as claimed. In reference to the Defendant applying to persons who were customers of *Jabez Vernon*, or of the Plaintiff to deal with him, the Plaintiff is entitled to an injunction in accordance with the decision in *Labouchere* v.

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Dawson (1) which, it is submitted, has not been overruled, but is still a binding authority. The cases of *Leggott* v. *Barrett* (2), and *Walker* v. *Mottram* (3) have been decided since, and in them the decision in *Labouchere* v. *Dawson* was followed. It may however be said that in *Walker* v. *Mottram* the decision in *Labouchere* v. *Dawson* was questioned, and that in *Pearson* v. *Pearson* (4) it was overruled, but neither of those cases was like the present. Until there be a case upon all fours with *Labouchere* v. *Dawson*, and a distinct reversal of that decision, it ought to be considered as a binding authority, and the Defendant should be restrained from soliciting the customers of the Plaintiff to deal with him. It may be noticed that in *Pearson* v. *Pearson* the judgment was that of a majority of the Court, and it is submitted that the observations of Lord Justice *Baggallay* and Lord Justice *Cotton* should be considered as *dicta* merely.

Vernon R. Smith, for the Defendant:—

The injunction asked for is in reference to a covenant which is in restraint of trade. The covenant is unreasonable and not at all necessary for the protection of the covenantee. It goes much too far as it is unlimited in regard to space; and also in reference to the manufacture which may be carried on by the covenantor. Literally construed it will prevent the Defendant from manufacturing articles which are entirely disconnected with the business which he has sold to the Plaintiff; and in any place remote from the Plaintiff's works, and that will be infinitely more than necessary for the protection of the Plaintiff. The covenant is therefore void: *Ward* v. *Byrne* (5); *Rousillon* v. *Rousillon* (6). [*Levy* v. *Walker* (7) was also referred to.]

The decision in *Labouchere* v. *Dawson* has been distinctly overruled by the Court of Appeal in *Pearson* v. *Pearson*, and it is no longer a binding authority, therefore as to the part of the motion which has reference to applying to customers for business the Plaintiff is certainly not entitled to any injunction.

(1) Law Rep. 13 Eq. 322.
(2) 15 Ch. D. 306.
(3) 19 Ch. D. 355.
(4) 27 Ch. D. 145.
(5) 5 M. & W. 548.
(6) 14 Ch. D. 351.
(7) 10 Ch. D. 436.

Hastings, Q.C., as *amicus Curiæ*, mentioned that in a recent case of *Collier* v. *Chadwick*, the Court of Appeal had taken the same view of the law as expressed in *Pearson* v. *Pearson* (1).

Manby, in reply, submitted that as the covenant was only against trading in a particular name, it was not in restraint of trade and was valid.

STIRLING, J. (after reading the first part of the notice of motion, and the covenant in the indenture of assignment, continued):—

Now, as I read the words, it is not a covenant that *John Hallam* will not carry on business as a manufacturer. If it had been it would *primâ facie* have been bad as being in restraint of trade without any limit; and there is no evidence in the case to shew it to be reasonable that so wide a covenant should be taken.

But the words "under the said name or style of *John Hallam*, or *Hallam Brothers*," appear to me to qualify the whole covenant. It is not really a covenant against carrying on a trade, but against using a particular name or style in trade. It was contended that such a covenant is in restraint of trade. No authority was cited in support of the proposition; and it seems to me that it does not fall within the principle upon which a covenant in restraint of trade has been held to be bad. The principle was laid down by Chief Justice *Best* in the case of *Homer* v. *Ashford* (2), where his Lordship said (3): "The law will not permit anyone to restrain a person from doing what the public welfare and his own interest requires that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void." Here the Defendant is not restrained from employing, or bound not to employ his talents, his industry, or his capital in any useful undertaking. He may do all these. He may employ his talents, his industry, and his capital in any useful undertaking he pleases. All that is restrained is the use by him, in so doing, of a particular name or style. It does not appear to me that that falls within the rule by which a covenant in restraint of

(1) 27 Ch. D. 145.

(2) 3 Bing. 322.

(3) 3 Bing. 326.

STIRLING, J. 1886 VERNON v. HALLAM.

trade has been held to be bad, and in the absence of any decision on the point, and upon an interlocutory application, I cannot so hold. I think, therefore, that upon the first part of the notice of motion the Plaintiff is entitled to the injunction for which she has asked until the trial of the action.

As to the second branch of the notice of motion, which relates to the issuing of circulars, advertisements, or notices, that is founded upon the facts that *Jabez Vernon* is dead, and that the Plaintiff is his legal personal representative. She is desirous of realizing the estate of the intestate, of which the business and the goodwill form part, or, if she is able so to do, to make arrangements with somebody to carry on the business, or to execute orders for her benefit. The Defendant has issued circulars which plainly represent that the old business of *Hallam Brothers*, which was carried on at *Butterthwaite Mills*, will be carried on at *Westfield Terrace*, and the Plaintiff is entitled to an injunction to prevent the issuing of such circulars. The next branch of the notice of motion asks for an injunction to restrain the Defendant from applying to any person who was a customer of the Plaintiff to deal with him, and that is founded upon the case of *Labouchere* v. *Dawson* (1), but as I read the recent decision in *Pearson* v. *Pearson* (2) that case has been overruled by the Court of Appeal. It was suggested that the observations made in delivering judgment by Lord Justice *Baggallay*, and Lord Justice *Cotton*, who formed the majority of the Court, were, in effect, merely *dicta*, but I cannot so read them. Both those learned Judges decided the case and founded their judgment upon the ground that *Labouchere* v. *Dawson* was wrongly decided. They expressly declined to follow that case. No doubt Lord Justice *Lindley* was of a different opinion, and considered that *Labouchere* v. *Dawson* was rightly decided, but his opinion did not prevail, and the decision in *Pearson* v. *Pearson*, as I read it, was that *Labouchere* v. *Dawson* is no longer a binding authority. The decision in *Pearson* v. *Pearson* is binding upon me, and moreover I have been informed during the argument, that in a recent case of *Collier* v. *Chadwick* the Court of Appeal took the same view. That being so, it follows that I cannot grant any injunction upon

(1) Law Rep. 13 Eq. 322. (2) 27 Ch. D. 145.

that part of the notice of motion. As to the fourth part of the application the Plaintiff is entitled to an injunction in the terms asked.

12th Feb. 1887. This case came on to-day to be heard as a short cause when the interlocutory injunction which had been granted was made perpetual with costs, the Plaintiff waiving all claim to damages.

Solicitors: *Peacock & Goddard*, agents for *Vickers, Son, & Brown, Sheffield; Pritchard & Sons*, agents for *Webster & Styring, Sheffield.*

T. F. M.

KEKEWICH, J.

1887

Jan. 27, 28.

TUCKER *v.* BENNETT.

[1885 T. 1252.]

Rectifying Settlement—After-acquired Property—Agency of Father—Gifts by Father—Assent of Husband—Will of Father—Usual Form—Delay.

In a marriage settlement of money given by the father of the wife and money belonging to the husband, there was also a covenant to settle the wife's after-acquired property on her for life and after her death, in default of issue, on her next of kin.

The settlement was drawn by the brother of the wife, who was a solicitor, and who settled the terms with the father and the husband but did not refer to her, and she was not informed of the terms. She was of age. The father afterwards made a will giving property to her.

There was no issue of the marriage, and fourteen years after the marriage the wife brought an action to have the settlement rectified:—

Held, that the father could not be considered as an agent for his daughter so as to bind her as to the settlement:

Held, that, as there was nothing in the nature of a bargain with the daughter, the making of his will by the father did not affect her right to have the settlement rectified:

Held, that the settlement was in an unusual form:

Held, that as nothing would by the proposed rectification be given to the husband, his assent to the settlement did not affect the case:

Held, that, under the circumstances, she was not barred by her delay in applying to have the settlement rectified:

Held, that the settlement must be rectified by giving the wife a power of appointment by will over the after-acquired property, and giving it to her absolutely if she survived her husband.

By a settlement dated the 26th of July, 1871, and made between *J. D. Tucker* of the first part, *Mary Bennett* (afterwards *Mary Tucker*) of the second part, and *William Bennett* and *A. O. Tucker* of the third part, after reciting the transfer to the trustees of £1070 Consols, representing £1000, and of certain railway stock, it was provided that the trustees should pay the income of the £1070 Consols, or of the investments arising from the sale thereof, to the wife during the life of the husband, and after the death of either to the survivor for his or her life; and should pay the income of the railway stock to the husband during their joint lives and after the death of either to the survivor during his or her life; and after the death of the survivor should hold

both the funds in trust for the children as the husband and wife should jointly by deed, or as the survivor of them should by will appoint, and in default of appointment for the children equally. And it was declared that in default of children of the marriage as therein mentioned, the trustees should hold the £1070 Consols after the death of the survivor in trust for such persons as the wife should by will appoint, and in default of such appointment, if she should survive the husband, then in trust for her, her executors and administrators; but if the husband should survive then in trust for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto if she had died intestate and without having been married. And as to the railway stock, after the death of the wife and in default of children, in trust for the husband, his executors and administrators. And it was further agreed and declared that if the wife then was, or if during the coverture she or the husband in her right should at one time and from one source become legally or equitably seised or possessed of or entitled to any real or personal property of the value of £200 or upwards, then and in every such case the husband and wife and all other necessary parties should vest the same in the trustees of the settlement upon trust to convert the said property as therein mentioned and stand possessed thereof upon the trusts and with and subject to the powers and provisoes thereinbefore declared concerning the investments of the £1070 Consols; save and except that the trustees should during the life of the wife pay and apply the annual income as she should, but not by way of anticipation, appoint, and in default of appointment into her proper hands for her separate use; and from and after her decease should stand possessed thereof in trust for the issue of the marriage as therein mentioned; and in default of issue, in trust for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto at the decease of the wife had she died possessed thereof intestate, and without having been married.

At the time of the marriage Mrs. *Tucker* was 22 years of age, and had been residing with her father, *T. O. Bennett*. The settlement was prepared and drawn by *W. Bennett*, a solicitor,

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and one of Mrs. *Tucker's* brothers. According to the evidence, the terms were fully discussed between the father, *T. O. Bennett*, and *W. Bennett*, and the settlement was assented to by the solicitor of Mr. *Tucker;* but Mrs. *Tucker* was never consulted as to or informed of the terms of the settlement. The £1070 Consols were the investment of £1000 given by *T. O. Bennett*, the father. The railway stock belonged to Mr. *Tucker*. Mrs. *Tucker* was at the time of the marriage entitled in reversion to about £800. *T. O. Bennett*, the father, by a will made in 1877, gave £2000 to the trustees of his daughter's settlement upon the trusts declared therein as to the £1070 consols, and gave the residue of his estate to his children, living at his decease. He died in 1878; and there was evidence that in making his will he was influenced by his knowledge of the terms of the settlement. Mrs. *Tucker* had no actual knowledge of the terms of the settlement until 1885. There was no issue of the marriage, and the presumptive next of kin of Mrs. *Tucker* were her five brothers and sisters.

Mrs. *Tucker* brought this action claiming rectification of the settlement by inserting a power to her in default of issue to appoint by will her after-acquired property, with an absolute trust for her in the event of her surviving her husband.

Warmington, Q.C., and *Mitchell*, for the Plaintiff:—

The solicitor made a mistake in not informing the lady of the unusual trusts of this property. She gave no instructions at all, and it was in fact all the doing of her father. She had an actual reversion, and had large expectations, so this is an essential part of the settled property, and it is not the case of a mere form for catching anything which may happen to come to her. [They were stopped by the Court].

Barber, Q.C., for the Defendant *W. Bennett*, who by order of the Court represented the parties presumptively entitled under the settlement:—

The deed was executed with due deliberation. The £1000 belonged to the father and he was at the time going to make a will. He would not have given the money, nor would he have made his will except on the faith of this settlement. The father

was the natural and proper guardian of the daughter and was the proper person to advise her. He must be considered as having acted for her and she must be bound.

Mr. *W. Bennett* and Mrs. *Tucker* were examined and deposed that Mr. *W. Bennett* and the father arranged the whole settlement, and that she knew nothing about it until 1885. A draft had been sent to Mr. *Tucker's* solicitor, who made some objections, but abandoned them.

B. B. Rogers, with *Barber*, Q.C.:—

She knew the settlement was being made, and left it all to her father, leaving him to decide what ought to be done. In order to rectify a settlement it must be shewn that all the parties misunderstood it. Here Mr. *Tucker* and the father understood it and acted on it.

Eve, for Mr. *Tucker* and the other trustee.

Warmington, in reply.

KEKEWICH, J. (after stating the object of the suit and the circumstances, continued):—

It is said that this settlement is not to be rectified, and on five different grounds, one being more important than all the others.

The five grounds which have been urged are these, first, that the father was an agent for the daughter in making the settlement, such as it is; secondly, that a new will was made by him, so as to bring it into accord with the settlement, and that that debars the Plaintiff from seeking relief if otherwise she is entitled to it; thirdly, that the settlement is not unusual; fourthly, that the husband assented to it in its present state, and that therefore it cannot be rectified at the suit of the wife; and fifthly, that the wife comes too late.

I will deal with those different points in order, and first as regards the agency. It has been argued strenuously and with apparent confidence that in a case like this the father is the natural agent for a daughter engaged to be married, and about to

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settle property coming to her through him. So far as I am concerned I think that the sooner any such notion is dissipated the better. I think that the father is the natural agent of the daughter for many purposes, for instance, to receive either directly, or through the solicitor of the husband, the husband's proposals, to submit either through his solicitor or directly the proposals on behalf of the daughter—and it may be that until a very late period it is not necessary, and in some cases not even desirable that the daughter should be separately represented, or have some person acting for her protection to see that what is right is done for her. But undoubtedly at some time or other the daughter should be represented in that way, and at some time either a legal adviser or somebody competent to take his place should step in and say whether the proposals or the way in which the proposals are carried out in the settlement are right and proper in the daughter's interests. I cannot doubt, or allow to be doubted, and my experience certainly is, that that is done in all cases where business is properly conducted in a business-like manner, and it seems to me to be only right and proper. Now in this case it is not pretended that anything of the kind was done. Mr. *William Bennett* said in answer to me that he did consider himself as acting as the solicitor for his sister, but at the same time he took his instructions from his father. It has been plain throughout the case, and not denied, that this is so. The father was evidently a man of some strength of mind, determined to have his own way, and though desiring to do and intending to do what was best for his child, rather asserting a parental right to do it as and when he pleased. It is always better when one intends to do right to do it in the way which conventional rules point out—but unfortunately he did not do so. Therefore it being proved before Mrs. *Tucker* was put in the box, and it having been proved still more clearly by her evidence, that she never at any time really instructed any one, and was not really represented in the matter of the settlement by any one whose duty or whose intention or wish was to protect her interests in the way in which those interests ought to have been protected, I hold that as regards this first point the settlement is not binding upon her, and that she is now entitled to call it in question.

As regards the second point, namely, that the father's will was altered to make it accord with the settlement. If it had been proved—if it were a fair inference from the facts—that the daughter had been in any way a party to a bargain of that kind, the case would have stood in a very different position from what it does now. It is not suggested that it was ever mentioned to the daughter that the father intended to alter his will, or that the will and the settlement were under consideration at the same time, and there was nothing approaching to a bargain even in the popular sense of the word. Anything in the shape of a bargain in the legal sense of the word there certainly was not, and there is no pretence for supposing it. That being so, if the testator really altered his will so as to bring it into accordance with the settlement that may be an unfortunate result. But Mrs. *Tucker* is certainly not to blame for it, and I cannot on that ground prevent her from having rights to which she is otherwise entitled.

As regards the character of the settlement it is suggested that it is not unusual. The settlement deals with three different classes of property; first, the property brought into settlement by the wife, provided no doubt immediately by the father; secondly, the property brought into settlement by the husband; and, thirdly, the other or after-acquired property of the wife, with which for aught that anyone could then tell the father had no concern. She was entitled at the time to a sum which, having regard to the property in settlement, was considerable, a sum of £800 coming to her under the will of her grandmother, and she had expectations perhaps from other sources, certainly from her father's will. The settlement properly dealt not only with what might come to her, but with what was then hers under the grandmother's will, to which however there is no reference. The Bank annuities settled by the lady through her father are settled in the ordinary way upon herself during the joint lives for her separate use, then to the survivor for life, and then to the children, according to the appointment by deed of the two or by will of the survivor, and in default, for all the children equally; then in default of issue of the marriage taking a vested interest, the money is settled in the way which I have always regarded as the most usual, in favour of the wife, her appointees, and next of kin,

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according to the statute, exclusive of the husband. When we turn to the clause dealing with the after-acquired property we find that the trusts are in the first instance declared by reference to this property brought in by the wife, and this is done in the fullest and most precise manner. It is to be held when brought into settlement upon the trusts and with and subject to the powers and provisions before declared concerning the moneys to arise from the sale of the Bank annuities, and the stocks, funds, and securities in which they were invested. If the settlement had stopped there, there would have been no difficulty, but that clause is followed by "save and except," which upsets all that had gone before, for so far from repeating the trust for the Bank annuities the settlement provides that it is to go in the first instance to the wife for her separate use during her life, and after her decease (without any intervention of a life estate to the husband), to the children according to her appointment by will, and in default of such appointment, in the usual way to the children equally. Now I am not prepared to say that that was not quite proper. Nothing arises upon that, and I am not now proposing to rectify the settlement by putting in a life estate for the husband. There may have been good reasons, though I do not at present understand them, why the husband should not have had a life interest in the after-acquired property. But the point arises on the trusts in default of children, and those, instead of following the usual form, are simply for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto at the decease of the said *Mary Bennett* had she died intestate and without having been married. I cannot think that the provision would have been wise in any event, because it points to a contingent class without any power of altering that class, and therefore it might lead to trouble and a distribution of property in a way which would not be convenient. But that is not the question. The question is whether there ought to have been inserted, or whether it is usual to insert, a power of appointment in the wife by will, so as to give her, if she dies in the lifetime of the husband, a power of disposition, and a trust in her favour absolutely if she happens to be the survivor. That is done with regard to the consols, and I think it is the usual course to pursue.

I think that it was also the usual course to pursue in the covenant to settle.

The next objection is that the husband assented to the settlement in its present state, and that therefore it cannot be rectified at the suit of the wife. There is a challenge on the part of the Defendant, Mr. *Bennett*, to find any case in which a settlement has been rectified where one party has assented. Putting it in that way there is no such case, and probably there will be no such case, because the suggestion is that the settlement is sought to be rectified at the instance of the present Plaintiff, though there is a contract between several parties, and one of the parties to the contract has assented to the settlement in its existing state. That is not a true statement of facts. The contract which is about to be rectified under the order which I am about to make is a contract between the wife and other parties excluding the husband. He is no party to the contract as regards the settlement of her fortune, except so far as no settlement could properly have been made without his assent. It is not a question of giving him a life interest; he is giving up nothing; nothing is given to him by the settlement, nothing is claimed for him under the rectification which is now asked for. It is entirely a question between the wife on the one hand, and those persons who presumably will take under that ultimate trust on the other. I think therefore that the argument as regards the husband's assent has no application.

Last of all is a suggestion of delay. The lady was married in 1871, and it is in 1885 that she asserts this right. I am not sure that a period of fourteen years is too great for a claim of this kind. It might have some considerable weight, if parties had died and if there were difficulty in proving what had then taken place. But except the father I do not think that we have missed any material witness on the present occasion, and such evidence as the father could have given has been amply supplied by Mr. *William Bennett*, who saw him frequently and had heard his explanations and intentions as regards the settlement and also as regards the will. There is also this to be borne in mind; the rectification which is now asked was of no practical value until it was reasonably ascertained that there would be no children of the marriage, and that therefore a power of appointment became

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convenient and necessary, until, in other words, Mrs. *Tucker* could reasonably conclude that if she made a will, whether in favour of her husband or a stranger, that will would have practical operation on the funds comprised in the other and after-acquired property.

I think, therefore, that this part of the settlement must be rectified by introducing language equivalent to that which is found in the settlement as regards the consols, that is by giving the wife a power of appointment by will, in the event of her dying in the lifetime of her husband, and giving her an absolute property in the event of her surviving him.

As to the question of costs, I think that mistakes have been made, but that they were honest mistakes. I am satisfied that every one desired and intended to act honestly as regards the others. I do not think that any one is to blame, except for an excess of kind intention not pursued in a practical and convenient manner, and therefore I am very unwilling that any party should suffer in the matter of costs on account of such mistakes. I shall therefore order the costs of all parties as between solicitor and client to be paid out of the trust fund comprised in the provision as to other and after-acquired property. The order will be indorsed on the settlement as is usual.

Solicitors for Plaintiff: *Bolton & Mote.*
Solicitors for Defendant: *Bolton, Robbins & Co.*

C. M.

Applied. Re HOWLETT (*decd.*). [1949] 2 All E.R. 490.

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Feb. 24, 25; *March* 4.

[1885 W. 4487.]

Possession—Guardian by Nurture—Bailiff for Infants—Marriage—Attaining Twenty-one—Change of Right—Liability to account.

The owner of a public-house and cottages devised them to his widow during her life or widowhood, with remainder to his four infant children. His widow married again, but continued to reside in and manage the public-house; and she received the rents of the cottages and maintained the children. One of the children whilst still an infant married, but she and her husband for some months resided in the public-house. They then left it and had not since received anything from the estate of the testator. She and her husband brought an action against her mother for one fourth of the rents and profits:—

Held, that after her second marriage the mother was in possession as bailiff for her infant children, and not as guardian by nurture, or by leave of her children, or as a trespasser, and was therefore a trustee and liable to account:—

Held, that though on the daughter's marriage the right to receive the rents passed to her husband, this did not change the character of the mother's possession:—

Held, that it was not changed when the daughter came of age:—

Held, therefore, that the mother was liable to account to the daughter and her husband for the rents and profits.

WILLIAM TODD by his will devised all his real estate unto his wife *Elizabeth* for her life, or until she married again, and from and after her decease or marrying again he devised his said real estate unto and equally between his children. *William Todd* died on the 24th of May, 1875. At the time of his death he was entitled, subject to the life estate of his mother, *Hannah Todd*, to some cottages, and to a public-house which he occupied called the *Masons' Arms*, at *Middleton Moors*, in the county of *Durham*. He left four children all minors. The widow continued after his death to reside in and manage the public-house, and after the death of *W. Todd's* mother on the 6th of February, 1878, she also received the rents of the cottages, the four children residing with and being maintained by her, and the license for the public-house being in her name. On the 13th of July, 1876, she married *W. Stanwick*. In 1878 she was deserted by *W. Stanwick* and obtained a protection order. On the 3rd of August, 1880, *Hannah*,

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one of the four children, was married to *Thomas Wall;* and she attained the age of twenty-one years in 1883. She and her husband resided with her mother until the 21st of January, 1881, but then went away and had not since received any part of the rents and profits of the estate. The other three children had continued to reside in the public-house with and were supported by their mother. The value of the estate was said to be about £800.

Thomas Wall and *Hannah Wall* brought this action against *W. Stanwick* and *Elizabeth Stanwick* praying a declaration of title as to one fourth part of the estate, and for an account of the rents and profits, and for payment of the amount found due, and for possession of the one fourth.

The Defendant *Elizabeth Stanwick* pleaded that she was guardian by nurture of the Plaintiff and the other children, and had maintained them out of her earnings; and that the children of *W. Todd* had, since the death of his mother, been in possession of the estate; and that she was not liable to account.

Barber, Q.C., and *A. A. Baker*, for the Plaintiffs.

Mrs. *Wall* and other witnesses for the Plaintiffs were examined.

Farwell, for *Elizabeth Stanwick*:—

This is an unfounded action. It was the children who were in possession and allowed the mother to live with them, not she who was in possession. For several years Mrs. *Wall* was clearly in possession with her sisters, and that state of things cannot have been put an end to merely because she went away with her husband. The mother was right in continuing to manage the public-house and support her children, and it cannot be presumed that she was a wrongdoer: *Reading* v. *Royston* (1). The action ought to have been against the three other children. The children clearly came into possession without any formal act. Ought the mother on her marriage to have gone out of doors and asked to be re-admitted: *Goodtitle* v. *Newman* (2); *Whitcombe* v. *Whitcombe* (3); *Cruise*, Dig. (4) Take the converse case. If this state

(1) 1 Salk. 242.
(2) 3 Wils. 516.
(3) Prec. Ch. 280.
(4) 4th Ed. vol. iii. p. 345.

of things had continued for twelve years, could she have set up a title by possession against her children. The law attributes, if possible, possession to the lawful owner: *Doe* v. *Brightwen* (1). The case made on the pleadings is that the mother is a trespasser; if so she is not liable for mesne profits: *Norton* v. *Frecker* (2); *Litchfield* v. *Ready* (3); *Bac.* Abr. Account (A.).

This is in fact an action of ejectment, but will no more lie than if the mother had been an ordinary guest, and no account can be given in such an action. The Plaintiff might have come back at any time. She had been maintained by her mother, who was guardian by nurture. Whatever may have been the rights during her infancy, on her marriage the right to recover the rents passed to her husband, and there was no longer any infancy or guardianship.

Barber, in reply:—

The cases cited do not apply. Guardianship by nurture ends at the age of fourteen: *Bac.* Abr. (4), and is confined to the personal custody of the child: *Rex* v. *Inhabitants of Sherrington* (5).

An action for an account will lie against anyone in possession of the estate of an infant; *Morgan* v. *Morgan* (6); *Roberdeau* v. *Rous* (7); *Howard* v. *Earl of Shrewsbury* (8); and is not confined to the time of infancy: *Blomfield* v. *Eyre* (9). A guardian is trustee for the ward, and it does not signify in this action whether the mother is treated as agent or guardian. But she was in fact agent for the Plaintiff: *Pascoe* v. *Swan* (10).

Farwell, in reply on the cases:—

They were all cases where the infant had been excluded. Here she was maintained, and no account can be directed in that case: *Brown* v. *Smith* (11). It is guardianship in socage, which ends at fourteen: *Bac.* Abr. Guard. (A.) n.

(1) 10 East, 583.
(2) 1 Atk. 524.
(3) 5 Ex. 939.
(4) Vol. iii. p. 404.
(5) 3 B. & Ad. 714.
(6) 1 Atk. 489.
(7) Ibid. 543.
(8) Law Rep. 17 Eq. 378.
(9) 8 Beav. 250.
(10) 27 Beav. 508.
(11) 10 Ch. D. 377.

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March 4. KEKEWICH, J.:—

That except by residing with her mother, and being maintained by her, Mrs. *Wall* has derived no benefit from the one-fourth share of her father's estate, to which she has been entitled in possession from the 6th of February, 1878, is admitted; and the question between the Plaintiffs and Defendants is to what extent, if at all, she can claim benefit therefrom in this action. It must be considered with reference to three periods: first, from the 6th of February, 1878, to the 3rd of August, 1880, the date of Mrs. *Wall's* marriage; secondly, from the latter date until Mrs. *Wall* attained twenty-one in 1883; and, thirdly, from then until the present time. The first thing to do is to determine in what character Mrs. *Stanwick* has occupied since her own estate ceased on her second marriage, or rather since the 6th of February, 1878, when the reversion fell in. The distinction might have been material, if it would otherwise have been sound to refer the occupation to a wrongful act; but the authorities cited by Mr. *Farwell*, and especially *Goodtitle* v. *Newman* (1), shew that, as from the date when the children's estate accrued, they must be deemed to have been in legal possession, and therefore only the date the 6th of February, 1878, need be regarded. But Mrs. *Stanwick* continued in physical occupation of the *Masons' Arms* and in receipt of the rents and profits of the cottages. In what character? Guardianship by nurture (suggested by the defence) would not confer the rights required to justify the mother's acts, nor will any other specific guardianship suffice to explain the occupation and receipt of rents and profits from first to last, and it would be difficult and inconvenient to treat the character as changed from time to time, especially as some of the children have all along been and still are infants. It will, I think, be safer and more correct to treat the widow as having occupied and received rents and profits as the bailiff of her infant children. Not only is this character known to the law, but it is presumed to exist wherever circumstances require it—that is, wherever it is proper to make a man accountable for the rents and profits of an infant's estate, and he cannot be shewn to have been in possession in some other character. This is fully explained by Vice-

(1) 3 Wils. 516.

Chancellor *Wood* in *Thomas* v. *Thomas* (1) and by the late Master of the Rolls in *Howard* v. *Earl of Shrewsbury* (2), where the old cases on the subject are cited. Having regard to the strictures on the Plaintiffs' pleadings it is not unimportant to observe that such a bailiff occupies a fiduciary position, so that he may properly be styled a trustee, as a testamentary guardian may be (see *Mathew* v. *Brise* (3), where the *Statute of Limitations* was held inapplicable on this ground). He is accountable because he fills that character—that is, because he is in possession, not on his own behalf, but as agent for some other person. Therefore I hold that Mrs. *Stanwick* must render an account for the first of the three periods, and what on taking such account appears due will be payable to the Plaintiffs.

The second period is from the date of Mrs. *Wall's* marriage in August, 1880, to the time when she attained twenty-one in 1883. But for one objection it would not have been necessary to consider this period separately. It was urged on behalf of the Defendant that, as from the date of the marriage, such rights as belonged to Mrs. *Wall* became vested in her husband, and that he, and not she, being thenceforward entitled to the rents and profits, Mrs. *Stanwick* cannot be treated as accountable as bailiff for an infant. True it is that by the marriage the husband acquired a freehold estate in his wife's lands during their joint lives, and that from that moment his receipt, and his receipt only, would would have been a good discharge to Mrs. *Stanwick*. But can that change the character of the occupation or enable Mrs. *Stanwick* to say that she is not accountable to the husband and wife who are joined as Plaintiffs here? It would be grievous if I were compelled to allow this technical objection to prevail, and I can find no principle or authority which enforces that conclusion. In *Fitz.* Nat. Br. (4) it is stated that "the power of a guardian in socage is gone by the taking of a husband by the infant, and yet they shall have account against the guardian, if he continues after," and the analogy between guardian in socage and bailiff is sufficiently complete to make the rule applicable here. As regards the third period, there is really no difficulty,

(1) 2 K. & J. 79.
(2) Law Rep. 17 Eq. 397-401.
(3) 14 Beav. 341.
(4) Vol. i. p. 118 B, note (*a*).

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if once it be assumed that the Defendant is accountable in the manner above-mentioned. Mrs. *Stanwick* cannot be heard to say that, having entered and received rents and profits as bailiff for Mrs. *Wall* and her other infant children, and being therefore accountable to them, she ceased to fill that character and ceased to be accountable merely because Mrs. *Wall*, one of those children, attained twenty-one, although she the widow continued in possession. The case of *Blomfield* v. *Eyre* (1) was cited, to shew that the jurisdiction of the Court in such cases is not taken away by the infant attaining majority; but I do not think it is an authority for more than this—that a bill would lie after majority for rents and profits received before. I doubt also whether *Morgan* v. *Morgan* (2) carries the case further, but in *Thomas* v. *Thomas* (3), already cited, Vice-Chancellor *Wood* distinctly held that where a man had entered as guardian (meaning bailiff), the Court would never allow him to set up any other title to the estate. It would be strange if Mrs. *Stanwick* could remain in possession as bailiff for the three infant children, and accountable to them for three-fourths of the rents and profits, and yet not be accountable for the other fourth to the Plaintiffs. But if that were so, she might, I think, be treated as in possession of the one undivided fourth belonging to the Plaintiffs, who would be entitled to recover possession thereof from her, together with mesne profits. My view, however, is that she is accountable as bailiff, and will continue to be so accountable until the relation of principal and agent has been dissolved. How that can be done I do not for the moment consider. I must, therefore, direct an account of the rents and profits received by Mrs. *Stanwick* from from the 6th of February, 1878, until the present time. There must be an inquiry also of what real estate she has been in occupation, and for what time, and she must be charged with an occupation rent. As against one-fourth of such receipts and rent belonging to the Plaintiffs there must be set such sums as she on inquiry may be allowed for Mrs. *Wall's* maintenance and education, for which purpose it will be right to inquire, not what sums were actually expended for these purposes, but what, having regard to all the circumstances, ought to be allowed.

(1) 8 Beav. 250. (2) 1 Atk. 489. (3) 2 K. & J. 79.

I must deal with the costs. The litigation has been conducted on each side with some bitterness, which is not pleasant. I believe, from what I saw of Mr. *Dix*, the Plaintiffs' solicitor, in the witness-box, that he would willingly have accepted the offer of £200, or otherwise have found a way to put an end to this family dispute; but the Plaintiffs have brought the action to trial and have obtained judgment. On the other hand, Mrs. *Stanwick* has resisted the claim made against her, raised technical objections to a claim right in substance, and denied her liability as a trustee. Yet, as she fills that character and is made accountable for that reason, I think it on the whole right to treat her as such in the matter of costs, which will be taxed as between solicitor and client and deducted from the balance found due on the account. For the ultimate balance there will be liberty to apply. There the matter must rest unless both parties will enable me to do more. The Plaintiffs, I understand, are willing to make an amendment bringing the other children before the Court as defendants, and asking a sale of the real estate. If Mrs. *Stanwick* is content to have this done and to have the action so amended brought before me on affidavit evidence, I can probably declare the title and, having regard to the nature of the property, direct an immediate sale. I can then, also, direct such inquiries and accounts as, together with those above-mentioned, will enable full justice to be done to all parties concerned. In that event, of course, the costs will have to be dealt with hereafter.

Solicitor for Plaintiffs: *W. J. Titley*, for *Dix & Warlow, Newcastle-on-Tyne.*

Solicitors for Mrs. *Stanwick*: *Meredith, Roberts & Mills*, for *Bowser & Jennings, Bishops Auckland.*

C. M.

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The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1887, will be as follows:—

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ADMINISTRATION—*Devised Real Estate—Liability of Devisee to unsatisfied Debts of Testator—Alienation by Devisee — Marriage Settlement — Married Woman—Separate Estate—Restraint on Anticipation*—11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 47, *ss.* 6, 8 —*Married Women's Property Act*, 1870 (33 *&* 34 *Vict. c.* 93), *s.* 12.] The liability, under the Act 11 Geo. 4 & 1 Will. 4, c. 47, of a devisee of land, who alienates the land, to the unpaid debts of the testator, is such that, on the alienation, the debts become his own debts to the extent of the value of the land alienated.—Consequently, when a woman to whom land had been devised settled it on her marriage, after the passing of the Married Women's Property Act, 1870, the first trust being for herself absolutely until the marriage, and, after its solemnization, on trust for herself for her life, without power of anticipation, with remainder on trusts for the issue of the marriage:—*Held*, that, the testator's personal estate being insufficient to pay his debts, the life interest of the settlor was, notwithstanding the restraint on anticipation, liable to make good the deficiency, to the extent of the value of the devised land; her liability to satisfy the debts of the testator, which arose on her alienation of the land by the settlement, being a debt "contracted by her before marriage" within the meaning of sect. 12 of the Married Women's Property Act, 1870.—*Sanger* v. *Sanger* (Law Rep. 11 Eq. 470) and *London and Provincial Bank* v. *Bogle* (7 Ch. D. 773) followed. *In re* HEDGELY. SMALL *v.* HEDGELY - 379

2. —— *Payment of Debts—Deficiency of Personal Estate—Abatement—Contribution by Real Estate—Portions charged on Real Estate.*] A testator devised his real estate to the use of his wife during her life or widowhood, with remainder to the use of trustees for a term of 500 years, on trust to raise, by mortgage of the real estate or out of the rents and profits, portions of £5000 apiece for each of his younger children, with remainders in strict settlement, the testator's eldest son taking the first life estate. The testator's general personal estate was insufficient for the payment of his debts, and, consequently, the specifically bequeathed personal estate and the real estate had to contribute:—*Held*, that, as between the portioners and the persons entitled to the real estate on which they were charged, the former were not bound to contribute to make good the deficiency.—*Raikes* v. *Boulton* (29 Beav. 41) followed.—*Long* v. *Short* (1 P. Wms. 403) considered and explained.—*Held*, also, that, as between the real estate and the specifically bequeathed personal estate, the former must contribute in proportion to its full value, not in proportion to its value less the amount of the portions. *In re* SAUNDERS-DAVIES. SAUNDERS-DAVIES *v.* SAUNDERS-DAVIES - - 482

3. —— *Payment of Debts — Mixed Fund of Realty and Personalty—Payment out of Personal Estate—Contribution by Real Estate—Interest.*] A testator by his will declared in effect that his debts, legacies, funeral and testamentary expenses, and the costs, charges, and expenses incidental to the execution of the trusts of his will, should be paid rateably out of all his estate, real and personal. In the administration of his estate by the Court, the debts, &c., were paid out of the personalty, but without prejudice to the liability of the realty. On the further consideration of the action:—*Held*, that the real estate must make good to the personal estate its rateable proportion of the amount paid out of the personal estate for debts, &c., with interest.—The decree in *Williams* v. *Kershaw* (Seton on Decrees, 4th Ed. vol. i. p. 590) followed. ASHWORTH *v.* MUNN - 391

4. —— *Personal Representative of Trader—Carrying on Trade of Deceased—Goods bought by Representative for Purposes of Trade—Rights of the Vendors.*] The administratrix of an intestate,

ADMINISTRATION—*continued.*

a dealer in builders' materials, carried on the intestate's trade, and bought cement for the purposes of the trade. On the 15th of April, 1886, a receiver and manager was appointed in an administration action brought by the infant child of the intestate. On the 22nd of April the vendors recovered judgment against the administratrix for the price of the cement, but judgment was not signed till the 18th of May, on which day the cement remaining in specie was sold along with other effects under an order in the administration action. Execution was never issued by the vendors of the cement, but they applied in the administration action to have the proceeds of its sale applied in payment of their debt. Kay, J., refused this relief, but declared them entitled to a lien on the beneficial interest of the administratrix in the intestate's estate. The vendors appealed:—*Held*, that the cement, as between the vendors and the administratrix, was the property of the administratrix, she being a debtor to them for the price, and that as between the administratrix and the estate the cement belonged to the estate subject to the right of the administratrix to be indemnified for the price if she was not a debtor to the estate—that the vendors could not have any higher claim than hers, and were not entitled to anything more than the order gave them.—Whether the order was right in declaring them entitled to a lien, *quære*. *In re* Evans. Evans *v.* Evans - - - - 597

—— Action for—Absent parties - - 347
See Practice. 1.

ADMINISTRATOR—Carrying on trade of intestate - - - - - 597
See Administration. 4.

—— Statute of Limitations - - 558, 560, n.
See Limitations, Statute of. 1.

AFFIDAVIT—Attachment—Service - 172
See Practice. 4.

—— Further consideration - - - 347
See Practice. 1.

AFTER-ACQUIRED PROPERTY—Covenant to settle - - - - 227
See Husband and Wife. 2.

—— Rectification of settlement - - 754
See Settlement. 2.

AGREEMENT—Rectification—Parol evidence
See Mistake. [367

APPEAL—For costs - - - - 120
See Practice. 2.

—— Notice of—Day in vacation - - 22
See Practice. 7.

—— Time for—Extension - - - 664
See Practice. 3.

APPOINTMENT - - - 65, 186
See Power. 1, 2.

ARREST—*Debtor—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-s.* 3—*Fiduciary Capacity—Auctioneer.*] An auctioneer is a person acting in a fiduciary capacity within the meaning of the Debtors Act, 1869, sect. 4, sub-sect. 3, and if he makes default in payment of the money produced by the sale of goods entrusted to him for sale when ordered to pay it by a Court of Equity he is

ARREST—*continued.*

liable to attachment, whether he still holds the money or has parted with it. Crowther *v.* Elgood - - - - C. A 691

ASSIGNMENT OF DEBT—Notice - - 128
See Company. 9.

ATTACHMENT—Service—Affidavits - 172
See Practice. 4.

AUCTIONEER—Arrest—Debtors Act - 691
See Arrest.

BANKER—*Deposit by Money-Dealer of his Customers' Securities—Custom of Trade—Estoppel—Foreign Bonds payable to Bearer—Negotiable Securities—Purchase without Notice.*] S. gave to E., with whom he was associated in a financial adventure, certificates of stock in a foreign railway, of which he executed transfers in blank, and bonds of foreign companies, for the purpose of raising a loan.—Some of the foreign bonds were made payable to bearer, and in others the name of the obligee was left blank, the bonds being transferable, after the name had been filled in, by entry in the company's books. There was evidence that both these classes of bonds were treated in the city of London as negotiable securities transferable by delivery.—E., with the acquiescence of S., gave these securities to M., who was a money-dealer in London, for the purpose of his raising money on them from joint stock banks. M. obtained an advance from these banks by depositing the securities, together with the securities of other customers, with them, having first filled in the names of the nominees of the banks in the transfers of the railway stock.—M. soon after became bankrupt, and the banks claimed to hold the stock and bonds as security for all the debts due from him to them. There was evidence that it was the custom for banks dealing with money-dealers in London to advance money to them on the deposit of the securities of the money-dealers' customers en bloc, without regard to the interest of the particular customers:—*Held*, that although there was no proof of a general custom of trade in the city of London that money-dealers could pledge their customers' securities en bloc for their own debts, there was sufficient evidence of such a course of dealing between the banks and M., and that E. had notice of such course of dealing;—That although S. did not authorize E. to deal with the securities as he pleased, but only by way of mortgage, yet as he had executed the transfers in blank and had handed to E. bonds transferable by delivery, he was estopped from objecting to the legal title of the banks:—That the bonds, although not strictly negotiable securities, were to be treated as such between the parties, on the authority of *Goodwin* v. *Robarts* (1 App. Cas. 476);—That the banks, having the legal title in the stock and having obtained the bonds in their ordinary course of dealing with M. without any reason for suspecting that he was exceeding his authority, were purchasers for value without notice, and were entitled to hold them as security for all the debt due from him. Easton *v.* London Joint Stock Bank - - - - - C. A. 95

BASE FEE—Covenant for further assurance 415
See Tenant in Tail.

BILL OF COSTS - - - 433, 452, 504
See SOLICITOR. 1, 2, 3.

BILL OF SALE—*Validity—Form—Rate of Interest—Payment by Instalments—Proviso for forcible Seizure—Power of Sale—Costs and Expenses—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, 13, *and Schedule.*] A bill of sale of personal chattels granted in 1884 to secure £80; (1.) stated the rate of interest as "1s. in the pound per month;" (2.) stated the stipulated times or time of payment of principal and interest as "by equal monthly payments of £8, the first payment to be made on the 1st of March next, but if default be made in any payment when it becomes due then the whole of the principal unpaid and the interest then due shall be at once payable;" (3.) contained a proviso making void the security on payment of the principal sum and interest and any expenses which the grantee might properly incur in lawfully seizing and removing the chattels, and any costs he might properly incur in defending and maintaining his rights under the bill; (4.) a power, in case the grantee became entitled to seize the chattels, to break open doors and windows in order to obtain admission; and (5.) after five clear days from the day of seizure to remove and sell the chattels and retain out of the proceeds the principal unpaid and interest due and all costs and expenses he might incur as aforesaid and the expenses of sale.—In an action (inter alia) for a declaration that the bill of sale was void as not being, in these five respects, in accordance with the form given in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882:—*Held*, that the bill was valid and did not in any one of these five respects offend against the statute.—*In re Morritt* (18 Q. B. D. 222) followed as to the power to break open doors and windows.—The decision of Stirling, J., affirmed. LUMLEY *v.* SIMMONS [C. A. 698

—— Covering deed—Debentures - - 43
See COMPANY. 1.

BURIAL GROUND—*Separation of Parishes—Vicar—District Parish—Rector—Burial Fees—Ancient Churchyard—Cemetery—Burial Board—"Incumbent or Minister"—Jurisdiction—Burials Act*, 1852 *and* 1853 (15 & 16 *Vict. c.* 85), *ss.* 32, 52; 16 & 17 *Vict. c.* 134—*Walton-on-the-Hill Rectory Act*, 1843 (6 & 7 *Vict.*)] Where a cemetery is formed by a burial board under the Burials Acts, 1852 and 1853, for a parish which never had any burial-ground, the incumbent of the parish is bound to perform the services in the consecrated part of the cemetery over bodies of parishioners and inhabitants of his parish, and is entitled to take any ecclesiastical fees which the board may collect in respect of such services.—*Hornby* v. *Toxteth Park Burial Board* (31 Beav. 52) discussed.—The parish of Walton, which included the township of West Derby, had an ancient churchyard, fees being, by custom, payable to the vicar (as distinguished from the rector) for burials therein.—By the Walton Rectory Act, 1843, the township of West Derby was made a separate parish. It comprised three chapels of ease with consecrated cemeteries attached which, prior to the separation, had been provided for the parish of Walton, and the sentences of consecration of

BURIAL GROUND—*continued.*
which reserved double fees for burials to the vicar of Walton and the curates of the chapels. No districts were attached to any of these chapels. The parish of West Derby never had any separate burial-ground of its own, but in 1884 a burial-ground was provided in that parish by a burial board under the Burials Act, 1852 (15 & 16 Vict. c. 85), extended by 16 & 17 Vict. c. 134, a portion of it being duly consecrated.—An action having been brought by the rector of West Derby against the board claiming the right to bury and receive fees for burials in such burial-ground—the Court being of opinion that it had jurisdiction to entertain the action, as the question involved one of property, namely, the right to fees:—*Held*, reading sects. 32 and 52 of the Burials Act, 1852, together, that, in the consecrated portion of such burial-ground, the Plaintiff, as rector of West Derby, was under an absolute obligation, by himself or by his curate, or such duly qualified person as he might authorize, to perform the same duties in respect of burial in such burial-ground of parishioners or inhabitants of West Derby as he would have been obliged to perform if it had been the burial-ground of his parish, and was entitled to the rights and authorities incident to such duties; and was also entitled to receive all such fees as the burial board might collect or receive in respect of such duties. STEWART *v.* WEST DERBY BURIAL BOARD - - - - 314

CAPITAL—Separate estate—Right to recover
See HUSBAND AND WIFE. 3. [85, 712

CASES—*Adam's Policy Trusts* (23 Ch. D. 525) dissented from - - - 511
See HUSBAND AND WIFE. 1.

—— *Allen, In re* (34 Ch. D. 433) followed 607
See SOLICITOR. 4.

—— *"Alpine" Trade-mark, In re* (29 Ch. D. 877), questioned - - - - 623
See TRADE-MARK.

—— *Aylwin* v. *Witty* (30 L. J. (Ch.) 860) considered - - - - 234
See INSURANCE—LIFE.

—— *Brackenbury's Trusts, In re* (Law Rep. 10 Eq. 45) followed - - - 209
See TRUSTEE ACTS. 1.

—— *Brocklehurst* v. *Railway Printing and Publishing Company* (W. N., 1884, p. 70) referred to - - - - 43
See COMPANY. 1.

—— *Broughton* v. *Broughton* (5 D. M. & G. 160) discussed - - - - 77
See TRUSTEE.

—— *Burdick* v. *Garrick* (Law Rep. 5 Ch. 233) followed - - - - 462
See LIMITATIONS, STATUTE OF. 4.

—— *Burridge* v. *Row* (1 Y. & C. Ch. 183) considered - - - - 234
See INSURANCE—LIFE.

—— *Cherry's Settled Estates, In re* (4 D. F. & J. 332) followed - - - 24
See LANDS CLAUSES ACT.

—— *Clemence, Ex parte* (23 Ch. D. 154) disapproved - - - - 646
See COMPANY. 11.

CASES—*continued.*

—— *Cormack* v. *Beisly* (3 De G. & J. 157) followed - - - - 155
See Solicitor. 5.

—— *Cradock* v. *Piper* (1 Mac. & G. 664) discussed - - - - 77
See Trustee. 2.

—— ——— v. ——— (1 Mac. & G. 664) followed - - - - 675
See Trustee. 3.

—— *Crumlin Viaduct Works Company, In re* (11 Ch. D. 755) approved - - 128
See Company. 9.

—— *Daubney* v. *Shuttleworth* (1 Ex. D. 153) overruled - - - - 22
See Practice. 7.

—— *Davis* v. *Tollemache* (2 Jur. (N.S.) 1181) observed upon - - - 415
See Tenant in Tail.

—— *Dumble, In re* (23 Ch. D. 360) explained
See Will. 7. [357

—— *Edmunds* v. *Waugh* (Law Rep. 1 Eq. 418) approved - - - 721
See Limitations, Statute of. 3.

—— *Foster* v. *Great Western Railway Company* (8 Q. B. D. 515) followed - - 24
See Lands Clauses Act.

—— *Fowler, In re* (16 Ch. D. 723) distinguished
See Tenant for Life. [136

—— *Gill* v. *Downing* (Law Rep. 17 Eq. 316) considered - - - - 234
See Insurance—Life.

—— *Glenny and Hartley, In re* (25 Ch. D. 611) dissented from - - - 370
See Settlement. 1.

—— *Golds and Norton's Contract, In re* (33 W. R. 333) not followed - - - 386
See Vendor and Purchaser. 1.

—— *Goodwin* v. *Robarts* (1 App. Cas. 476) followed
See Banker. [95

—— *Grant* v. *Grant* (Law Rep. 5 C. P. 727) distinguished - - - - 255
See Will. 5.

—— *Hampden* v. *Wallis* (26 Ch. D. 746) considered - - - - 172
See Practice. 4.

—— *Hodgson* v. *Bective* (*Earl of*) (1 H. & M. 376) explained - - - - 357
See Will. 7.

—— *Hornby* v. *Toxteth Park Burial Board* (31 Beav. 52) discussed - - 314
See Burial Ground.

—— *Jenner-Fust* v. *Needham* (32 Ch. D. 582) distinguished - - - - 143
See Mortgage. 1.

—— *Jull* v. *Jacobs* (3 Ch. D. 703) distinguished
See Will. 7. [357

—— *Kendall* v. *Hamilton* (4 App. Cas. 504) distinguished - - - 536
See Partnership.

—— *Labouchere* v. *Dawson* (Law Rep. 13 Eq. 322) not followed - - - 748
See Goodwill.

CASES—*continued.*

—— *Lacey & Son, In re* (25 Ch. D. 301) referred to - - - — - 452
See Solicitor. 2.

—— *London and Provincial Bank* v. *Bogle* (7 Ch. D. 773) followed - - 379
See Administration. 1.

—— *Long* v. *Short* (1 P. Wms. 403) considered and explained - - - 482
See Administration. 2.

—— *MacAllister* v. *Bishop of Rochester* (5 C. P. D. 194) followed - - - 223
See Practice. 11.

—— *Mellor's Policy Trusts, In re* (7 Ch. D. 200) explained - - - - 511
See Husband and Wife. 1.

—— *Mercers' Company, Ex parte* (10 Ch. D. 481) questioned - - - - 24
See Lands Clauses Act.

—— *Morritt, In re* (18 Q. B. D. 222) followed
See Bill of Sale. [698

—— *Norris, In re* (27 Ch. D. 333) approved 370
See Settlement. 1.

—— *Pearson* v. *Pearson* (27 Ch. D. 145) followed
See Goodwill. [748

—— *Phelps' Settlement Trusts, In re* (31 Ch. D. 351) not followed - - - 618
See Trustee Acts. 3.

—— *Raikes* v. *Boulton* (29 Beav. 41) followed
See Administration. 2. [482

—— *Sanger* v. *Sanger* (Law Rep. 11 Eq. 470) followed - - - - 379
See Administration. 1.

—— *Shearman* v. *British Empire Mutual Life Assurance Company* (Law Rep. 14 Eq. 4) considered - - - - 234
See Insurance—Life.

—— *Stonor's Trusts, In re* (24 Ch. D. 195) approved - - - - 227
See Husband and Wife. 2.

—— *Tempest* v. *Camoys* (*Lord*) (21 Ch. D. 576, n.) distinguished - - - 136
See Tenant for Life.

—— *Tollner* v. *Marriott* (4 Sim. 19) distinguished
See Will. 1. [742

—— *Travis* v. *Illingworth* (2 Dr. & Sm. 344) approved - - - - 370
See Settlement. 1.

—— *West* v. *Reid* (2 Hare, 249) considered 234
See Insurance—Life.

—— *Williams* v. *Kershaw* (Seton on Decrees, 4th Ed. vol. i. p. 590) followed - 391
See Administration. 3.

—— *Wood's Estate, In re* (31 Ch. D. 607, 617, 618) disapproved - - - 24
See Lands Clauses Act.

—— *Wyggeston Arbitration, In re* (33 W. R. 551) considered - - - - 172
See Practice. 4.

CEMETERY - - - - - 314
See Burial Ground.

CHARGE OF DEBTS - - - 391
See Administration. 3.

CHARGING ORDER—Solicitor - - 155
See Solicitor. 5.

CHARITY—*Bequest—Scheme.*] The property of a religious unincorporated society was under the absolute control of the general superintendent. A testator bequeathed legacies to "General W. B." (who was the general superintendent) "for the spread of the gospel":—*Held*, that the legacies should be paid to W. B. without a scheme. *In re* Lea. Lea *v.* Cooke - 528

CHEQUE—Statute of Limitations - - 561
See Limitations, Statute of. 2.

CHOSE IN ACTION—Assignment of—Notice 128
See Company. 9.

CHURCHYARD—New burial ground - 314
See Burial Ground.

COMPANY—*Debenture*—"*Covering Deed*"—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 17—*Registration.*] Debentures were issued by a company under its common seal with a condition annexed that the holders of debenture bonds of that issue were entitled pari passu "to the benefit of an indenture dated the 24th of November, 1883, whereby—subject to a sum of £ —— and interest secured on mortgage—the freehold buildings and premises of the company and all the machinery, fittings, fixtures, and furniture of the company in and about the said premises, and any other machinery, fittings, fixtures, and furniture that may be substituted therefor during the continuance of the security effected by the said indenture are expressed to be vested in trustees to secure the payment of all moneys payable on such debenture bonds."—The "covering deed" of November, 1883, purported to be a conveyance and assignment of the hereditaments, fixtures, and chattels in terms rather larger than those used in the condition; the future chattels being not only those substituted for existing chattels, but also any brought upon the premises in addition thereto. This deed was not registered under the Bills of Sale Act, 1882.—Some months later the directors (in consequence of the decision in *Brocklehurst* v. *Railway Printing and Publishing Company* (W. N. 1884, p. 70) caused a new debenture to be issued, which was stated to be supplemental to the original bond of the holder to whom it was given, and purported to charge, in favour of the holder, the amount due on the debenture upon "the undertaking (of the company) and all its property, both real and personal, present and future, subject as to any part thereof to any subsisting mortgages":—*Held*, 1. (affirming Kay, J.), that, assuming the covering deed to be void for want of registration under the Bills of Sale Acts, the intention to give the debenture-holders a valid charge, within the meaning of the Bills of Sale Act, 1882, s. 17, on the property comprised in that deed, was manifest on the face of the debentures, read in conjunction with the annexed condition, and amounted to an equitable contract which would be carried into effect to give a charge upon all the property of the company; and, accordingly, that the chattels intended to be charged with the money due on the original debentures were subject to an equitable charge in favour of the holders of those debentures.—2. That the supplemental debentures which were issued as part of, and in order to cure a supposed defect in the original issue, did not create a charge upon any

COMPANY—*continued.*
property of the company which was not comprised in the original debentures. Ross *v.* Army and Navy Hotel Company - - C. A. 43

2. —— *Debenture—Issue—Debentures sealed but not delivered—Debentures payable to Bearer—Estoppel—Companies Act*, 1862, *s.* 153.] The directors of a company directed their secretary to make arrangements for the issue of debentures, for payment of advances to the company. The debentures were accordingly prepared, being made payable to bearer and sealed and stamped; and were placed in a box the key of which was kept by the secretary. The box was deposited in the office of the company, which was also the office of T., one of the directors, who had made large advances to the company.—Some of the debentures were given out by the secretary to an agent for him to issue them to the public, which he did not succeed in doing. The company was wound up by order of the Court. After the commencement of the winding-up the agent returned the debentures to T., who gave some of them to R. & Co., his own creditors. They took them, believing that they had been regularly issued and that T. had power to dispose of them:—*Held* (affirming the decision of Chitty, J.), that the debentures had not been issued before the commencement of the winding-up.—*Held*, also, that the other debenture-holders of the company were not estopped from disputing the validity of the debentures held by R. & Co. Whether the company would have been estopped, *quære*. Mowatt *v.* Castle Steel and Iron Works Company - - - - C. A. 58

3. —— *Debenture—Public Undertaking—Companies Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 16), *s.* 41—*Judgment—Receiver.*] In an action by a debenture-holder on behalf of himself and the other holders of an issue of £15,000 debentures, the Court declared that the holders of that issue were entitled to stand in the position of judgment creditors for £15,000, and appointed a receiver of the property of the company subject to be seized by a judgment creditor. Hope *v.* Croydon and Norwood Tramways Company - - - - - 730

4. —— *Promoter—Secret Profit—Purchase of Mine by Syndicate—Resale to a Company—Rescission impossible—Liability to account—Principal and Agent.*] On the 1st of February, 1873, four persons (one of whom was a solicitor and conducted the negotiation) purchased a leasehold mine for £5000, with the view of reselling it at a profit to a company to be formed. They completed their purchase on the 17th of March, 1873. On the 4th of April, 1873, they entered into a provisional contract with a trustee for an intended company for the sale of the mine to the company for £18,000 in cash. On the 8th of April, 1873, the company was registered under the Companies Acts, and its principal object, as stated in its memorandum of association, was the purchase of the mine, and its articles adopted and ratified the contract of the 4th of April, 1873, and three of the vendors were named in the articles as directors. The whole of the share capital (£30,000) was placed, chiefly by sales in the market, before the incorporation of the

COMPANY—*continued.*

company by the vendors, who on the 9th of April paid to the company the whole amount of the share capital. On the same day the shares were allotted in accordance with lists handed in by the vendors, and the vendors were paid their purchase-money of £18,000. The contract of the 1st of February, 1873, was not disclosed to the company. In 1882 the company went into voluntary liquidation, and about May, 1883, the above facts became known to the company. In June, 1883, the company allowed judgment by default to go against them in an action by the lessor to recover possession of the mine. In 1884 the company commenced two actions, one against the executors of two deceased vendors, and the other against the two surviving vendors, to recover the secret profit made by the vendors on their sale to the company, on the ground that they stood in a fiduciary position to the company at the time they bought the mine. It was proved that the memorandum and articles of the company were not prepared by the vendors, and it did not appear by whose instructions they were prepared:—*Held*, that as the evidence failed to shew that the vendors, at the time they bought the mine, were promoters of or in a fiduciary position to the company, they were not liable to refund the profit they made on the transaction. Ladywell Mining Company *v.* Brookes. Ladywell Mining Company *v.* Huggons - - 398

5. —— *Reduction of Capital — Preference Shares—Companies Act*, 1867 (30 & 31 *Vict. c.* 131, s. 11)—40 & 41 *Vict. c.* 26.] The articles of a submarine telegraph company, limited by shares, and formed in 1872, with a capital of £130,000 in £10 shares, gave power to increase the capital by the issue of new shares, with power to give preferential rights to any shares so created. It was provided that such new capital should be considered part of the original capital, and should be subject to the same provisions, except so far as the resolutions authorizing the raising of it might otherwise direct. The articles also empowered the company by special resolution to reduce its capital, and alter the amount and denomination of its shares. In 1874 a special resolution was passed for raising £60,000 by the issue of 6000 shares of £10 each, which were to be paid up in full on allotment, and to be entitled to a fixed preferential dividend of £10 per cent. These shares were all taken and paid up. In 1884 one of the submarine cables of the company broke down, and was lost, diminishing the assets by about one half. The company passed a special resolution for reducing the capital to one half by reducing to one half the nominal amount of each share, ordinary or preferential. A preferential shareholder brought an action on behalf of himself and the other preferential shareholders to restrain the company from acting on that resolution and from applying to the Court to sanction it.—Bacon, V.C., granted an injunction, being of opinion that what was proposed to be done was a breach of the company's contract with the preferential shareholders:—*Held*, on appeal, that the preference shareholders took their shares subject to the provisions of the articles, which contained a power to the company to reduce its

COMPANY—*continued.*

capital and alter the amount and denomination of its shares; that there was no bargain with the preference shareholders that they should receive £6000 a year on the whole of their shares, the resolution being satisfied by their receiving £10 per cent. on the nominal amount of their shares, and that what was proposed to be done was no breach of the contract with them. — Per Cotton, L.J.: If what it was proposed to do had been a breach of the contract with the preference shareholders they would have had a right to prevent the company from exercising, in a manner inconsistent with the contract, the powers for reduction of capital given by 30 & 31 Vict. c. 131, and 40 & 41 Vict. c. 26.—Per Cotton, L.J.: *Semble*, on an application to sanction a reduction of capital the Judge, though satisfied that the rights of creditors are not interfered with by the reduction, is not bound to sanction it if he sees that it would work unfairly as against any shareholders who do not consent to it. Bannatyne *v.* Direct Spanish Telegraph Company - C. A. 287

6. —— *Reduction of Capital—Ordinary and Preference Shareholders—Confirming Resolution—Petition—Discretionary Power of Court—Companies Act*, 1867, *s.* 11—*Companies Act*, 1877.] The power given to the Court by sect. 11 of the Companies Act, 1867, to confirm a resolution to reduce capital is a discretionary power—that is to say, the Court may exercise it either by confirming with or without conditions, or by declining to confirm on a full consideration of all the circumstances. One matter to be taken into account, is whether the proposed scheme would work injustice between the different classes of shareholders: if, in the opinion of the Court, such would be its effect, it is not the function of the Court to impose conditions, amounting to an alteration of the scheme; but the proper course to take, if such an alteration is requisite, is simply to refuse to confirm the resolution, leaving it to the company to prepare a new scheme if they should think fit.—The capital of a company consisted of ordinary shares of £10 each, part issued with £9 per share paid up and the remainder unissued, and of preference shares of £10 each all fully paid up, bearing a fixed preferential dividend of 10 per cent. per annum, the deficiency in any year to be made up out of the profits of the next or subsequent years. No dividend had been paid on the ordinary shares, and there were some preference dividends in arrear, they having been retained towards replacing the company's reserve fund which had become exhausted. The company having lost part of its assets, passed a special resolution for reducing its capital by a corresponding amount. This they did by writing off £5 per share from the amount paid up on each issued share and £5 per share from the nominal amount of each unissued share; the effect of which, it appeared, would be to place the company at once in a dividend-paying condition, and set free for the preference shareholders the preference dividends which had been retained. The resolution was passed by large majorities of both classes of shareholders.—Upon a petition presented by the company under the Companies Acts, 1867 and 1877, the Court confirmed the

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resolution for reduction. *In re* DIRECT SPANISH TELEGRAPH COMPANY - - - 307

7. —— *Rectification of Register—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Paid-up Shares.*] The members of a firm sold their assets to a company formed for the purpose under a verbal contract. All the shares in the company were issued to the partners or their nominees. The shares were issued as paid up to the extent of the purchase-money. After the lapse of fourteen years the Court, on being satisfied that all debts were provided for, rectified the register of members, by striking out the names of all the shareholders; and directing the issue of new shares, after a proper agreement had been executed and filed under the Companies Act, 1867, sect. 25. *In re* DARLINGTON FORGE COMPANY 522

8. —— *Registration—Name struck off Register of Joint Stock Companies—Restoration of Name—"Carrying on business or in operation"—Companies Act*, 1880 (43 *Vict. c.* 19), *s.* 7.] The power given to the Court, by sub-sect. 5 of sect. 7 of the Companies Act, 1880, to restore to the register of joint stock companies the name of a company which has been struck off by the Registrar under the provisions of that section, if the Court is "satisfied that the company was at the time of the striking off carrying on business or in operation," applies to the case of a company which at the time of the striking off was carrying on business only for the purpose of winding-up voluntarily and realising its assets.—Order to restore the name of such a company made, in the form No. 314 given in Chadwyck-Healey's Company Law, p. 665. *In re* OUTLAY ASSURANCE SOCIETY [479

9. —— *Winding-up—Assets—Order and Disposition—Chose in Action—Assignment of Debt—Notice—Judicature Act*, 1875, *s.* 10—*Bankruptcy Act*, 1883, *s.* 44, *sub-s. iii.—Companies Act*, 1862, *s.* 153.] The Bankruptcy Rules as to reputed ownership are not imported into the winding-up of companies by sect. 10 of the Judicature Act, 1875.—A limited company being indebted to H. & Co. on an acceptance, wrote to them a letter in January, 1885, in the following terms:—"We hold at your disposal the sum of £425 due from Messrs. C. & Co. for goods delivered by us to them up to the 31st of December, 1884, until the balance of our acceptance for £660 has been paid."—No notice was given by H. & Co. to C. & Co. until the 5th of February, 1885, which was after a petition for winding up the company had been presented:—*Held*, that the letter was an immediate equitable assignment to H. & Co. of all the debt due from C. & Co. to the amount of £425, and was complete as between the assignors and the assignees without any notice to C. & Co.—That as the Bankruptcy Rules as to reputed ownership do not apply to the winding up of companies, the debt did not form part of the assets of the company at the commencement of the winding-up.—*In re Crumlin Viaduct Works Company* (11 Ch. D. 755) approved. GORRINGE *v.* IRWELL INDIA RUBBER AND GUTTA PERCHA WORKS - C. A. 128

10. —— *Winding-up — Debenture-holder — Mortgagee — Fraudulent Preference — Right of Action—Rule in Bankruptcy—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 164—*Creditors—Dealing by the Company in the course of its Business—Payment by Directors of Debt due to themselves.*] B. and H., who were directors of a limited company, B. being the managing director, advanced moneys from time to time to the company to purchase goods and discharge pressing claims. In September, 1884, the company's premises were burnt down, and an insurance company admitted their liability to pay £3000 in respect of the damage. B. and H. then held a "directors' meeting," two directors forming a quorum, and passed resolutions for commencing actions against the company for the moneys they had advanced and for instructing solicitors to appear and consent on behalf of the company to immediate judgment.—The actions were accordingly brought and immediate judgment was taken by consent, and thereupon (the limited company being at the time practically insolvent), B. and H. obtained the £3000 from the insurance company under garnishee orders, and applied it in part payment of the debts due to themselves by the company. The company had issued mortgage debentures, each of which was in form a first charge upon all the property of the company both present and future, including uncalled capital, subject to the condition that such charge should be a floating security, and that the company might in the course of its business deal with the property charged in such a manner as the company might think fit; and in December, 1884, the holder of one of these debentures brought an action on behalf of himself and the other holders of the debentures against the company and B. and H., and claimed (1) repayment of the £3000 by B. and H., and (2), the usual relief in a debenture-holder's action. Two days after the issue of the writs in this action a petition was presented for winding up the company, and shortly afterwards a winding-up order was made.—At the trial of the action the Plaintiff relied on sect. 164 of the Companies Act, 1862, as entitling him to recover the £3000 on the ground of "fraudulent preference":—It was held by Bacon, V.-C. (1), that so much of the Plaintiff's claim as was based on fraudulent preference must be dismissed with costs; but (2) that as mortgagee he was entitled to the ordinary judgment for accounts and inquiries as to the debenture debt.—The Plaintiff appealed from the first part of the decision of the Vice-Chancellor, and at the hearing before the Court of Appeal it was contended on his behalf that the transaction complained of was not a dealing by the company in the course of its business with the property charged within the condition of the debenture:—*Held*, by the Court of Appeal, first, that the decision of the Vice-Chancellor upon the question of fraudulent preference was right; and, secondly, that the transaction complained of, being in fact the payment of a just debt while the company was still a going concern, was a dealing by the company in course of business within the condition of the debentures; and that the appeal must be dismissed with costs. WILLMOTT *v.* LONDON CELLULOID COMPANY [C. A. 147

11. —— *Winding-up—Distress for Rent—House in Occupation of Under-tenants—Charge of Deben-*

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ture-holders—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 163.] A company who were the lessees of a house where they carried on their business was ordered to be wound up, being indebted in an arrear of rent to their landlord. A scheme of reconstruction was sanctioned by the Court under which the lease was purchased by a new company; and the new company agreed with the landlord to pay him the arrears of rent and "all subsequent rent accruing due under the lease in manner therein provided," but no assignment of the lease to the new company was ever executed.—The new company issued debentures charging all their property to a much larger amount than the value of the furniture in the house.—The new company was also ordered to be wound up, a year's rent being due to the landlord:—*Held*, by Kay, J., that the landlord was entitled to distrain on the furniture as against the debenture-holders, and that as it was the only property of the company and the debenture debt was much greater than its value, the official liquidator had no interest in the matter and no power to interfere.—*Held*, also, that if the debenture-holders were out of the way, the landlord, although he had a claim for the rent under the agreement for which he could prove in the winding-up, could distrain according to *Ex parte Clemence* (23 Ch. D. 154), which, however, was disapproved.—*Held*, by the Court of Appeal (affirming the decision of Kay, J.), that as the charge of the debenture-holders was more than the value of the furniture, the furniture did not belong to the company, and the landlord was therefore entitled to distrain upon it; but the Court gave no opinion on the question whether the landlord could have distrained if the debenture-holders had been out of the way.—*Held*, also, that the fact that the debenture-holders were willing and offered to release their security and stand as general creditors made no difference in the landlord's right.—*Held*, also, that under an agreement between the liquidator and the landlord that the liquidator should sell the furniture and pay the proceeds of the sale, "less the auction charges," into Court, the liquidator was not entitled to deduct his own costs and charges in carrying out the sale. *In re* New City Constitutional Club Company. *Ex parte* Purssell [C. A. 646

12. —— *Winding-up—Remuneration of Liquidator—Companies Act*, 1862, *ss.* 93, 161—*Regulation for Remuneration of Liquidator*, 1868—*—"Divisible Assets"—Value of Shares.*] The regulation adopted by the Judges of the Court of Chancery in 1868 for fixing the remuneration of official liquidators is not binding upon the Judges, but is intended as a guide to them in exercising their discretion.—A limited company being in course of liquidation, a new company was formed, and a scheme was sanctioned by the Court, under which the new company took over the assets of the old company, and in consideration thereof agreed to pay its debts and to allot shares to the old shareholders instead of their old shares, each share to be of the nominal value of £1, with 15*s.* paid up, and their market value was about 16*s.* Chitty, J., in fixing the scale of remuneration of

COMPANY—*continued.*

the liquidator treated the value of the new shares allotted to the shareholders as assets of the old company of the value of 15*s.* each:—*Held*, by the Court of Appeal, that the Judge had acted on a right principle in having regard to the value of the new shares in fixing the scale of remuneration, and that they ought not to interfere with his discretion as to the value at which he estimated them.—"Divisible assets" in the regulation means assets free to be divided among the creditors and shareholders, not assets actually divided. *In re* Mysore Reefs Gold Mining Company [C. A. 14

COMPULSORY PURCHASE—Costs - - 24
See Lands Clauses Act.

CONDITION—Gift during widowhood - 362
See Will. 3.

—— Precedent—Construction of will - 742
See Will. 1.

CONDITIONS OF SALE - - - 386
See Vendor and Purchaser. 1.

CONTINGENCY—Will—Remoteness - 716
See Will. 2.

CONTRACT—*Parol Contract—Conversion.*] A testator agreed verbally to sell land, and received a deposit. The residuary devisee contracted in writing to sell the land to the same purchaser at the same price, to be paid partly by the deposit:—*Held*, that the devisee had not adopted his testator's parol contract so as to effect a conversion relating back to the testator's lifetime. *In re* Harrison. Parry *v.* Spencer - - 214

2. —— *Rescission—Indemnity—Partnership.*] A person who has been induced to enter into a contract of partnership by misrepresentations not such as would entitle him to bring an action of deceit for damages, has a right, on the contract being rescinded by the Court, to be indemnified against the debts and liabilities of the partnership. This is not giving damages, but is the proper consequence of rescinding the contract.—The nature and extent of the right to indemnity on rescission of a contract considered. Newbigging *v.* Adam - - - - - 582

—— Sale of land—Conversion—Dower - 166
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—— Sale of land—Statute of Frauds - 182
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CONVERSION—Contract to sell land—Dower 166
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—— Contract to sell land—Parol contract 214
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See Settled Land Act. 1.

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—— Bill of sale—Validity - - - 698
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—— Jurisdiction—Payment of purchase-money into Court - - - - 24
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—— Solicitor—Trustee—Profit costs - 77, 675
See Trustee. 2, 3.

—— Taxation - - 433, 452, 504, 607
See Solicitor. 1, 2, 3, 4.

COUSIN—Will—Construction - - 255
See Will. 5.

COVENANT—*Restrictive Covenant—Representations—Collateral Agreement.*] S. was the owner of various houses in Cromwell Gardens purchased from the Commissioners of the Exhibition of 1851, in the conveyance of each of which was a covenant that he would not carry on or permit to be carried on any trade or business, but would keep the house as a private dwelling-house. S. let one of the houses to M. S.'s solicitor sent to M. a draft lease with a letter ending: "I may perhaps add that the draft is the form used for all the houses on S.'s estates." The draft contained a restrictive covenant of the same nature as that in the conveyance to S., and against it was a note: "There is a covenant to this effect in the conveyance to S." Six years afterwards M. negotiated with S. for a long lease of the same house at a high premium, and a draft agreement was sent, which contained a provision that the lease should contain such covenants on the part of the lessee as were usually inserted by the lessor in leases of his other houses in Cromwell Gardens. M.'s solicitor thereupon wrote for the form of lease used by S., and a copy of a lease containing the restrictive covenant was sent, and a lease was granted to M. containing a similar covenant:—*Held*, that the representations, made by S. to a person negotiating for a lease, that this was the form of lease used by S., amounted not merely to a statement that this was the then form of lease, but to a collateral contract with the intending lessee, that the neighbouring property of S. should continue to be managed on that footing:—*Held*, therefore, affirming the order of Bacon, V.C., that M. was entitled to restrain S. from authorizing any of the adjoining houses to be used for the purpose of trade. Martin *v.* Spicer - - C. A. 1

—— For further assurance - - - 415
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—— In restraint of trade - - - 748
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CUSTOM OF TRADE — Bankers and money-dealers - - - - 95
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—— Remedy of holders—Receiver - 730
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DEBT—Married woman—Contracted before marriage - - - - - 379
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DEBTOR—Arrest of—Fiduciary relation—Auctioneer - - - - 691
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DEPOSIT OF SECURITIES — Money dealer — Custom of trade - - - 95
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DEVISE — Real estate—Liability to testator's debts - - - - 379
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DISCRETION—Trustees - - - 136
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DISENTAILING DEED—Base fee—Covenant for further assurance - - - 415
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DISTRESS—Winding up of company - 646
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DOWER—*Vendor and Purchaser—Contract to sell Real Estate—Death of Vendor before Completion—Defective Title to Part—Will—General Devise in Trust for Sale—Equitable Conversion—Gift to Wife of Income of Proceeds of Land—"Interest in Land"—Dower Act* (3 & 4 *Will.* 4, *c.* 105), *s.* 9.] A testator, having entered into a contract for the sale of real estate to a purchaser, died before completion. By his will he devised all his real estate to trustees for sale, and out of the proceeds to invest £1000 and pay the income thereof to his widow. He then gave various other legacies out of the proceeds, but made no disposition of the ultimate residue. After the testator's death it was found that no title could be made to a material part of the property comprised in the contract, and thereupon the trustees of the will rescinded the contract:—*Held* (1), that the contract did not effect an equitable conversion of any of the property comprised therein; and (2), that the gift to the widow of the income of part of the proceeds of the real estate was a gift to her of an "interest in land" within sect. 9 of the Dower Act, 3 & 4 Will. 4, c. 105, and that, therefore, she was not entitled to dower out of any part of her husband's estate. *In re* Thomas. Thomas *v.* Howell - - - - 166

ELECTION—*Will—Exercise of supposed Power of Appointment—Non-existent Power.*] A testatrix entitled for life to property which in case of her death without issue (an event which happened) went over to her brothers and sisters, of whom J. was one, by her will, purporting to exercise a power, which she erroneously supposed herself to possess, appointed the property to a class consisting of certain named persons referred to in the will as objects of the power, of whom J. was not one, and by a codicil gave to J. certain property over which she had a free power of disposal:—*Held*, that J. was put to his election whether he would take under or against the will. *In re* Brooksbank. Beauclerk *v.* James 160

—— Remuneration of solicitor—Old and new system - - - - 607
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—— Negotiable securities — Bonds payable to bearer - - - - 95
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—— Sched. I., Pt. I. - - - - 452
See SOLICITOR. 2.

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See WILL. 2.

GOODWILL—*Sale of Business and Goodwill—Covenant by Vendor not to carry on Business under his Name for a term of Years—Breach of Covenant—Restraint of Trade—Injunction.*] A covenant by a vendor of a business and the goodwill thereof, that he would not for a term of years carry on the business of a manufacturer either by himself or jointly with any other person under the name or style of J. H., or H. Brothers, the name of the business which he had sold, is not a covenant that the vendor would not carry on business as a manufacturer, but against using a particular name or style in trade, and an injunction was granted to restrain a breach of the covenant.—Where a vendor sold his business and commenced a similar business in the same locality and solicited customers of the old house to deal with him, the Court, following the decision in *Pearson* v. *Pearson* (27 Ch. D. 145), and being of opinion that the case of *Labouchere* v. *Dawson* (Law Rep. 13 Eq. 322) had been overruled by the decision in that case, refused to grant an injunction to restrain such solicitation. VERNON *v.* HALLAM - 748

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HUSBAND AND WIFE—*Married Women's Property Act*, 1870 (33 & 34 *Vict. c.* 93), *s.* 10—*Policy of Life Assurance — Construction — "Wife and Children"—Tenancy in Common.*] A policy was taken out on the life of the assured for the benefit of his wife and children:—*Held*, that his widow and children took as joint tenants.—*In re Mellor's Policy Trusts* (7 Ch. D. 200) explained.—*In re Adam's Policy Trusts* (23 Ch. D. 525) dissented from. *In re* SEYTON. SEYTON *v.* SATTERTHWAITE [511

2. —— *Separate Estate — Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 5, 19 — *After-acquired Property.*] By ante-nuptial settlement of 1873 the husband and wife covenanted to settle after-acquired property of the wife other than personal chattels, savings out of her separate income, or any moneys not exceeding in each case the value of £1000, "or any property belonging, or which may be given or bequeathed to or settled upon her for her separate use, all which excepted articles and property shall belong to the said (wife) and shall or may be used, enjoyed, and disposed of by her accordingly as if she were not under coverture."—Under the will, made in 1884, of her father, who died in the same year, the wife became entitled to a share of personalty exceeding £1000, and not limited to her separate use:—*Held*, that having regard to sect. 19 of the Married Women's Property Act, 1882—the effect of which is to limit the operation of sect. 5 by preventing the provisions of marriage settlements from being interfered with or affected by withdrawing therefrom property, which independently of the Act must have been brought into settlement—the share of the wife under her father's will had not been made separate estate so as to fall within the exception, but was bound by the covenant to settle after-acquired, other than separate, property.—And, *semble*, per Cotton, L.J., that upon the construction of the covenant, independently of sect. 19, the property in question

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was not within the exception.—*In re Stonor's Trusts* (24 Ch. D. 195) approved. *In re* Whitaker. Christian *v.* Whitaker - - C. A. 227

3. —— *Separate Estate—Restraint on Anticipation—Right to Capital—Construction of Will.*] A testator having a general power of appointment over a settled fund, appointed that a sum of £1500 should be raised and paid to his daughter, who was a married woman, absolutely for her separate use, without power of anticipation; and appointed that one-fourth of the residue of the fund should be held upon trust for the same daughter absolutely for her separate use without power of anticipation:—*Held* (affirming the decision of North, J.), that the daughter was not entitled to payment of the capital of one-fourth of the residue. *In re* Grey's Settlements. Acason *v.* Greenwood - - - - C. A. 85, 712

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INDEMNITY—Third party procedure - 261
See Practice. 12.

—— Partnership—Rescission of contract - 582
See Contract. 2.

INFANT—*Possession—Guardian by Nurture—Bailiff for Infants—Marriage—Attaining Twenty-one—Change of Right—Liability to account.*] The owner of a public-house and cottages devised them to his widow during her life or widowhood, with remainder to his four infant children. His widow married again, but continued to reside in and manage the public-house; and she received the rents of the cottages and maintained the children. One of the children whilst still an infant married, but she and her husband for some months resided in the public-house. They then left it and had not since received anything from the estate of the testator. She and her husband brought an action against her mother for one fourth of the rents and profits:—*Held*, that after her second marriage the mother was in possession as bailiff for her infant children, and not as guardian by nurture, or by leave of her children, or as a trespasser, and was therefore a trustee and liable to account:—*Held*, that though on the daughter's marriage the right to receive the rents passed to her husband, this did not change the character of the mother's possession:—*Held* that it was not changed when the daughter came of age:—*Held*, therefore, that the mother was liable to account to the daughter and her husband for the rents and profits. Wall *v.* Stanwick - - - - - 763

2. —— *Settlement upon Marriage—Infants' Settlement Act* (18 & 19 *Vict. c.* 43), *s.* 4—*Marriage of female Infant under the Age of Seventeen.*] The Court has jurisdiction in a case where a female infant has married under the age of seventeen, after she has attained that age, to direct a proper settlement of her property to be executed. *In re* Phillips - - - - 467

INFRINGEMENT—Patent - - - 458
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INJUNCTION—Libel on business - - 198
See Libel.

INSTALMENTS—Bill of sale - - 698
See Bill of Sale.

INSURANCE—LIFE—*Payment of Premiums by Person not sole Beneficial Owner—Lien—Salvage.*] E. mortgaged a policy of life assurance to F., and afterwards filed a petition for liquidation. Resolutions of the creditors were passed, under which E.'s friends were to pay 2*s.* in the pound on the unsecured debts, and the trustee was to assign to a nominee of the friends all E.'s property except the equities of redemption in the securities held by secured creditors. The terms of these resolutions were carried out, and E. obtained his discharge. Shortly after this, in 1883, E. agreed with D., who professed to be F.'s agent, for the purchase of F.'s interest in the policy, but no such purchase was ever carried out. Shortly after this agreement D. informed E. that none of the incumbrancers would pay the premium for that year, and E. paid it on the faith, as he deposed, of his interest under the agreement. There was no evidence that D. had any authority to enter into any agreement on behalf of F., or that F. had any knowledge of the contract or of the payment by E. F.'s representative, Mrs. F., brought an action to enforce her security, and the policy was sold for much less than the amount of the mortgage debt:—*Held*, by Bacon, V.C., that E. was entitled to be repaid out of the proceeds of sale the premiums for 1883 which he had paid, and that the residue must be paid to Mrs. F.—*Held*, on appeal, that E.'s payment of a premium in his character of owner of the equity of redemption could not give him a lien in priority to the mortgage debt; that E.'s belief that he had a valid contract for purchase, when he had not, could not give him any advantage, as regarded the premium, there being nothing to shew that F. knew of the alleged contract or of the payment of the premium; that in this state of the evidence no request from F. to pay the premium could be inferred, and no equity could be held to have arisen against F. on the ground of acquiescence or lying by; and that the fact that the policy had been preserved by E.'s payment did not give him a right to have the premium repaid nor give him a lien on the policy for it.—*Held*, therefore, that the whole proceeds of sale must be paid to Mrs. F. without deducting the premium.—*Semble*, the maritime doctrine of salvage has no application to the payment of premiums on a policy.—*West* v. *Reid* (2 Hare, 249), *Burridge* v. *Row* (1 Y. & C. Ch. 183), *Shearman* v. *British Empire Mutual Life Assurance Company* (Law Rep. 14 Eq. 4), *Gill* v. *Downing* (Law Rep. 17 Eq. 316), and *Aylwin* v. *Witty* (30 L. J. (Ch.) 860) considered. Falcke *v.* Scottish Imperial Insurance Company - - - C. A. 234

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—— Rate of—Bill of sale - - - 689
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See Practice. 4.

ISSUE OF DEBENTURES - - - 58
See Company. 2.

JOINT ACCOUNT—Mortgage - - 732
See Mortgage. 4.

JOINT TENANT—Mortgage in name of several persons - - - - 732
See Mortgage. 3.

—— Policy for benefit of wife and children 511
See Husband and Wife. 1.

JUDGMENT—Execution—Pawnbroker - 495
See Pawnbroker.

JUDGMENT CREDITOR — *Execution—Beneficial Interest.*] An execution creditor is not in the position of a purchaser or mortgagee who has advanced money on the faith of the property, and he can only take the beneficial interest of the debtor. Badeley *v.* Consolidated Bank 536

2. —— *Practice—Partnership Action—Dissolution—Receiver—Charge on Assets.*] After judgment had been pronounced in a Chancery action for dissolution of a partnership, and a receiver had been appointed, a creditor obtained judgment in the Queen's Bench Division against the firm for the amount of his debt and costs.—On an application in the Chancery action by the judgment creditor an order was made giving him a charge for his debt and costs on all the partnership moneys come or coming to the receiver; he, the creditor, undertaking to deal with the charge according to the order of the Court; the intention of the Court being to preserve to him all the rights he would have had if he had issued execution and the sheriff had seized and sold the assets on the day the application was made. Kewney *v.* Attrill - - - - - 345

LANDS CLAUSES ACT — *Incorporation with Special Acts — Compulsory Purchase — Payment out of Purchase-money — Costs — Jurisdiction — Rules of Supreme Court*, 1883, *Order* LXV., *r.* 1.] Commissioners were incorporated by 3 & 4 Vict. c. 87 (1840), for the purpose of taking lands and carrying out thereon certain public works, and by 9 & 10 Vict. c. 34 (1846), powers to construct a new street were conferred upon such Commissioners, and it was enacted that all and singular the enactments and provisions of the Act of 1840 should extend to the new improvements as if they had been authorized by the former Act.—Neither of these Acts contained any provision for payment by the Commissioners of the costs of applications for payment out of purchase-moneys in Court in respect of lands taken under the powers of the Acts.—On petition for payment out of Court of purchase-money of lands taken by the Commissioners:—*Held*, 1. (following *In re Cherry's Settled Estates* (4 D. F. & J. 332)), that the Lands Clauses Consolidation Act, 1845, could not be treated as incorporated with the Special Acts (3 & 4 Vict. c. 87, and 9 & 10 Vict. c. 34), so as to make the Commissioners liable to pay the costs of the petition for payment out.—Dictum of Lord Esher, M.R., in *In re Wood's Estate* (31 Ch. D. 607, 617, 618) disapproved.—2. The Judicature Acts and Rules of Supreme Court, 1883, Order LXV., rule 1, do not enable the Court or a Judge to order costs to be paid by persons who before the Acts

LANDS CLAUSES ACT—*continued.*
came into operation could not have been ordered to pay them: the effect and intention of the Acts and Orders being not to give any new jurisdiction to award costs, but only to regulate the mode in which costs are to be dealt with in cases where the Court antecedently had jurisdiction, either original or statutory, to award costs.—*Foster* v. *Great Western Railway Company* (8 Q. B. D. 515) followed.—*Ex parte Mercers' Company* (10 Ch. D. 481) questioned. *In re* Mills' Estate. *Ex parte* Commissioners of Works and Public Buildings [C. A. 24

LAPSE - - - - - 446
See Will. 4.

LEASE—Covenant - - - - 1
See Covenant.

—— Gift of, by will—Mistake - - 518
See Will. 6.

LEASEHOLD—Tenant for life—Liability to keep in repair - - - - 136
See Tenant for Life.

LIBEL — *Injury to Trade—Privilege—Malice—Erroneous Statement of Judgment in former Action—Injunction — Damages.*] The Plaintiff, who traded as R. H. & Co., and the Defendants, who traded as R. H. & Sons, were rival manufacturers of sail cloth. The Plaintiff had formerly been a partner in the Defendants' firm. In 1885 the Defendants brought an action against the Plaintiff claiming (inter alia) an injunction to restrain him from representing his firm to be the original firm of R. H. & Sons. At the trial of the action North, J., dismissed it, without costs as to that issue, and with costs as to the other issues. North, J., was satisfied by the evidence that the then Defendant had never made any such representation, but that on two or three occasions one of his agents, without his knowledge or concurrence, had represented that the then Defendant's firm was the original firm. The then Defendant repudiated this as soon as he knew it, and at the trial he offered by his counsel to give an undertaking that he would never make such a representation. North, J., desired that this undertaking should be inserted in the judgment; the Defendant assented, and it was accordingly inserted in the judgment drawn up by the Registrar. In 1886 the present Defendants distributed a printed circular, which stated that they were the original firm, and after giving the title of the former action, headed by the word "Caution," proceeded, "By the judgment the Defendant was ordered to undertake not to represent that his firm is, or that the Plaintiffs' firm is not, the original firm of R. H. & Sons. Messrs. R. H. & Sons, finding that serious misrepresentations were in circulation to their prejudice, felt themselves compelled to bring the above action":—*Held*, that the circular contained an untrue statement of the effect of the judgment in the former action; that it was a libel injurious to the Plaintiff's trade; that it was not privileged; that the Defendants had published it maliciously; and that the Plaintiff was entitled to an injunction, with the costs of the action.—But, there being no evidence of damage to the Plaintiff, except his own affidavit that the publi-

LIBEL—*continued.*
cation of the circular was calculated to injure him, and had injured him, in his business, which, he said, had greatly fallen off since the issue of it; and the Plaintiff not having brought the action till three months after he knew of the publication of the circular, only £5 damages were awarded to him. Hayward & Co. *v.* Hayward & Sons - - - - - - 198

LIEN—Creditors—Trade carried on by administrator - - - - 597
See Administration. 4.

—— Policy of insurance—Salvage - 234
See Insurance—Life.

—— Solicitor - - - - - 470
See Practice. 9.

—— Solicitor - - - - - 155
See Solicitor. 5.

LIFE INSURANCE—Payment of premiums—Salvage - - - - 234
See Insurance—Life.

LIMITATIONS, STATUTE OF—*Administrator—Intestacy — Claim of Estate — Leaseholds—Running of Time.*] Under the Statute of Limitations, 1833 (3 & 4 Will. 4, c. 27), s. 6, time begins to run as against an administrator claiming a chattel interest in land from the date of the death of the intestate, and not from the date of the grant of administration. *In re* Williams. Davies *v.* Williams - - - - 558
In re Bonsor & Smith's Contract - 560, n.

2. —— *Cheque — Administration Action — Claim to be a Creditor for Moneys lent, &c., and upon a Cheque, undated — Acknowledgment of Debt—"Time," when beginning to run—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61).] In an action commenced in 1885 for the administration of C. B.'s estate, on inquiries for creditors, A. J. P. brought in a claim to be paid a sum of £541 16*s.* 7*d.*, which, as to £441 16*s.* 7*d.* was for commission and moneys lent before March, 1878, and which, as to £100 was for payment of a cheque, undated, given by C. B. in March, 1878, and accepted by A. J. P. in discharge of a larger sum. C. B. was sent to the Cape of Good Hope in March, 1878, and died there in 1884. He, while on board ship, wrote a letter in which he asked A. J. P. to make out his account, and send it to him: "I will send it you as soon as possible." The account was sent in March, 1878, and C. B. afterwards wrote letters to A. J. P. in which he said, "I will send you a cheque as soon as I can" and "I will send some coin home as soon as ever I can":—*Held*, that as to the £441 16*s.* 7*d.* there had not been an acknowledgment sufficient to enable the Court to infer an absolute promise to pay.—As to the cheque, C. B. had not at the time of drawing it sufficient moneys at his bank to meet it, and was negotiating a loan, which he expected shortly to complete, out of which the cheque would be paid. The loan was not completed. A. J. P. was informed of that fact. The cheque remained undated and was never presented for payment.—*Held*, that the Statute of Limitations barred the claim, as the six years began to run when the letter was received stating that the loan would not be completed, and had long since elapsed. *In re* Bethell. Bethell *v.* Bethell - 561

3. —— *Mortgage — Sale — Interest — Mortgagee's Right to retain more than Six Years' Arrears—3 & 4 Will.* 4, *c.* 27, *s.* 42.] Sect. 42 of the Statute of Limitations (3 & 4 Will. 4, c. 27) does not affect the right of a mortgagee who has sold under his power of sale to retain out of the proceeds more than six years' arrears of interest.—After the judgment for the administration of the estate of a second mortgagee of real estate, the first mortgagees sold the mortgaged property under their power of sale and received the proceeds. A summons in the action was then taken out by the Plaintiff, a beneficiary under the will of the second mortgagee, to determine the question whether the first mortgagees were entitled to retain more than six years' arrears of interest. The first mortgagees were not parties to the action, but consented to appear on the summons to argue the question.—The second mortgage absorbed all the possible surplus of the proceeds of sale:—*Held*, that the first mortgagees were entitled to retain more than six years' arrears of interest.—*Edmunds* v. *Waugh* (Law Rep. 1 Eq. 418) approved of. *In re* Marshfield. Marshfield *v.* Hutchings - - - - 721

4. —— *Solicitor and Client.*] In 1868, upon the death of the mortgagor, the mortgaged property was sold by A., the mortgagee, under the power of sale contained in the mortgage deed. The balance of the proceeds after payment of the mortgage debt was retained by B., who, in effecting the mortgages, had acted as solicitor for both parties, and conducted the sale on behalf of A. The power of sale in the mortgage deed contained the usual provision that the surplus proceeds should be paid to the mortgagor, his heirs, or assigns.—The mortgagor had died unmarried and intestate, and being illegitimate left no next of kin. Administration had not been taken out to him.—A. died in 1877, having left all his property to his widow C., whom he appointed his executrix.—C. died in 1878, having appointed B. and R. her executors. Upon the death of B. in 1881, R., as being through C. the legal personal representative of A., claimed as against B.'s estate the balance of the proceeds of the sale in 1868 of the mortgaged property:—*Held*, that B., having received this balance in a fiduciary character as agent for A., and with full knowledge that A. was an express trustee of the balance for the mortgagor, and, in the circumstances, liable to a claim by the Crown, had brought himself within the principle of *Burdick* v. *Garrick* (Law Rep. 5 Ch. 233), and, accordingly, that the Statute of Limitations could not be set up as a bar to the claim. *In re* Bell. Lake *v.* Bell - 462

LIQUIDATOR—Remuneration - - 14
See Company. 12.

LUNATIC—*Application of Property for his Benefit—Lunacy Regulation Act*, 1862 (25 & 26 *Vict. c.* 86), *ss.* 12, 13—*Criminal Lunatics Act*, 1884 (47 & 48 *Vict. c.* 64), *s.* 10, *sub-s.* 3.] The power given by the Lunacy Regulation Act, 1862, s. 12, of making orders for the purpose of rendering the small property of a lunatic available for his maintenance or benefit, is to be exercised only for

LUNATIC—*continued.*
his benefit, and not for the purpose of enabling his creditors to obtain payment.—A person of small means was confined as a criminal lunatic in Broadmoor Asylum, and there appeared no reasonable prospect of his ever being released. His mother and brother applied for an order that his property, along with some property in which they were interested together with him, might be applied in payment of moneys for which the lunatic had given security, the mother undertaking to pay his other debts:—*Held*, that the application must be refused as not being for his benefit. *In re* Price - - - - C. A. 603
—— Appointment of new trustees—Trustee Acts *See* Trustee Acts. 3. [618
—— Mortgagee—Trustee Acts - - 663
See Trustee Acts. 4.

MAINTENANCE—Lunatic - - - 603
See Lunatic.
MALICE—Libel—Privilege - - - 198
See Libel.
MARRIED WOMAN—Power to act as next friend or guardian ad litem - - 465
See Practice. 6.
MARRIED WOMEN'S PROPERTY ACT—After-acquired property - - - 227
See Husband and Wife. 2.
—— Debts before marriage - - - 379
See Administration. 1.
MARSHALLING—Administration of estate—Portions charged on real estate - 482
See Administration. 2.
MISTAKE—*Specific Performance—Ratification of Agreement—Mutual Mistake—Parol Evidence—Statute of Frauds—Part Performance—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7.] Since the Judicature Act, 1873, the Court has jurisdiction (in any case in which the Statute of Frauds is not a bar), in one and the same action, to rectify a written agreement, upon parol evidence of mistake, and to order the agreement as rectified to be specifically performed. Olley *v.* Fisher - - - - - - 367
—— Order of Court—Rectification - 470
See Practice. 9.
—— Settlement—Rectification - - 754
See Settlement. 2.
—— Will—Misdescription - - 255, 518
See Will. 5, 6.
MONEY DEALER—Deposit of his customer's securities - - - - 95
See Banker.
MORTGAGE—*Foreclosure—Accruing Rents—Further Account—Time for Redemption.*] At the date limited for redemption in a foreclosure action money was in Court and in the hands of a receiver paid under a mining lease since the issue of the Chief Clerk's certificate. The foreclosure judgment gave liberty to any persons redeeming or, in the event of foreclosure, to the Plaintiffs, to apply for payment to themselves of funds in Court or in the hands of the receiver:—*Held* (reversing the decision of North, J.), that the Plaintiffs were entitled to an immediate order

MORTGAGE—*continued.*
for foreclosure absolute, and for payment of the money in Court and in the hands of the receiver without any further account.—*Jenner-Fust* v. *Needham* (32 Ch. D. 582) distinguished. Coleman *v.* Llewellin - - - C. A. 143

2. —— *Foreclosure—Staying Accounts and Inquiries under Judgment.*] Order made staying until further order, with liberty to apply, the prosecution of accounts and inquiries directed by a judgment in the nature of a foreclosure judgment (unless the Defendants would give security for the costs of the proceedings), on the ground that it was shewn to be highly probable that the amount due to the Plaintiffs would greatly exceed the value of the property, and that the costs of further proceedings would be thrown away. Exchange and Hop Warehouses, Limited *v.* Association of Land Financiers - - 195

3. —— *Mortgage in joint Names of several Persons—Joint Tenancy or Tenancy in Common—Joint Account Clause.*] Mortgages in fee were taken in the names of three sisters as joint tenants, each of the deeds containing a clause by which it was declared that the mortgage money belonged to the mortgagees on a joint account in equity as well as at law. The money advanced on the security of the mortgages formed part of the proceeds of the estate of a brother, to which the three sisters were, under his will, entitled as tenants in common. Having regard to this fact and the other facts in evidence:—*Held*, that notwithstanding the insertion of the joint account clause the mortgagees were entitled to the mortgage money as tenants in common. *In re* Jackson. Smith *v.* Sibthorpe - - - 732
—— Lunatic mortgagee—Trustee Acts - 663
See Trustee Acts. 4.
—— Statute of Limitations - - - 721
See Limitations, Statute of. 3.
MOTION—Notice of - - - - 22
See Practice. 7.

NEGLIGENCE—Trustee—Investment—Sufficiency of security - - - 70
See Trustee. 1.
NEW TRUSTEES—Settled Land Act—Conveyancing Act - - - - 508
See Settled Land Act. 2.
—— Trustee Acts - - - 209, 211, 618
See Trustee Acts. 1, 2, 3.
NEXT FRIEND - - - - 465
See Practice. 6.
NOTICE—Assignment of debt - - 128
See Company. 9.
—— Appeal—Amendment - - - 664
See Practice. 3.
—— Motion—For attachment - - 172
See Practice. 4.
—— Motion—For day in vacation - - 22
See Practice. 7.

ORDER AND DISPOSITION—Winding up of company - - - - 128
See Company. 9.

PARISH—Separation of - - - 314
See BURIAL GROUND.

PAROL CONTRACT—Sale of land—Conversion
See CONTRACT. 1 [214

PARTICULARS—False entries - - 88
See PRACTICE. 8.

—— Objections to patent - - - 152
See PATENT. 4.

PARTIES — Administration action — Absent parties - - - - 347
See PRACTICE. 1.

PARTNERSHIP — *Action to enforce Security—Bovill's Act* (28 & 29 *Vict. c.* 86)—*Share of Profits—Creditor—Rights of Surety.*] An action to enforce a security given by a trader is not an action to recover principal, profits, or interest within Bovill's Act, 28 & 29 Vict. c. 86; and may therefore be maintained by a person entitled to receive a share of the profits of a trader, although the other creditors of the trader have not been satisfied.—By deed it was agreed that a lender should advance money to a railway contractor: the contractor by way of security assigned the benefit of his contract and the materials employed by him, and covenanted to repay all advances within six months: and the lender was to receive interest and one tenth of the net profits made by the contractor:—*Held*, on the construction of the whole deed and of the correspondence between the parties that this deed was a device, and that the lender was a partner with the contractor, and must indemnify a person who had a claim against the contractor arising out of a guarantee given in connection with the contract. —The rights of a surety against his principal are not exactly the same as those of the creditor; and therefore, although a creditor who has recovered judgment against one partner cannot sue another partner, that rule does not take away the rights of a surety for one partner as against another partner.—*Kendall* v. *Hamilton* (4 App. Cas. 504) distinguished. BADELEY *v.* CONSOLIDATED BANK - - - - - 536

—— Contract—Rescission - - - 582
See CONTRACT. 2.

—— Dissolution—Receiver—Judgment creditor
See JUDGMENT CREDITOR. 2. [345

PATENT — *Disclaimer pending Action for Infringement—Motion for Leave—Form of Order—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 19.] On a motion, under sect. 19 of the Patents, Designs, and Trade Marks Act, 1883, by the Plaintiffs in an action for infringement of their patent dated in 1885, for liberty to apply at the Patent Office for leave to amend their specification by disclaimer, an order was made granting the leave asked for on the following terms, no statement of claim or defence having yet been delivered: No further proceedings to be taken in the action until the disclaimer had been properly made, and, if so made, the Plaintiffs to pay the Defendants' party and party costs of the action up to disclaimer: the Plaintiffs to undertake forthwith to take proceedings for disclaimer and then to amend their action by stating the disclaimer, founding the action simply upon the specification as amended. FUSEE VESTA COMPANY *v.* BRYANT & MAY, LIMITED - 458

PATENT—*continued.*

2. —— *Disclaimer pending Action for Infringement—Terms of giving Leave to amend by Disclaimer—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 19.] Where the Plaintiff in an action for infringement of a patent asks for leave to apply at the Patent Office to amend his specification by way of disclaimer, the Court will as a general rule impose the condition that the amended specification shall not be receivable in evidence in the action, though in particular cases less stringent terms may be imposed. BRAY *v.* GARDNER - - 668

3. —— *Petition for Revocation—Trial with vivâ voce Evidence—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 26.] A petition for the revocation of a patent having been presented under sect. 26 of the Patents Act, 1883:—*Held*, that the Respondents were entitled, as they desired it, to have the petition tried with vivâ voce evidence. *In re* GAULARD & GIBBS' PATENT - - - - 396

4. —— *Practice—Validity—Particulars of Objection—Nonconformity between provisional and complete Specifications*—46 & 47 *Vict. c.* 57, *s.* 29.] Where the defendant in a patent action objects to the validity of the plaintiff's patent on the ground that there is a want of conformity between the provisional and complete specifications, it is not sufficient for him to state in his particulars of objection that the invention described in the complete specification is not the same as the invention described in the provisional specification: he must state in what the difference consists. ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPORATION *v.* CROMPTON - - C. A. 152

PAWNBROKER—*Redeemable Pledges—Judgment—Execution.*] A pawnbroker's interest in redeemable pledges may be taken in execution under a fi. fa. *In re* ROLLASON. ROLLASON *v.* ROLLASON. HALSE'S CLAIM - - - 495

PLEDGE—Pawnbroker - - - 495
See PAWNBROKER.

POLICY OF INSURANCE - - - 234
See INSURANCE—LIFE.

—— Married Women's Property Act—Wife and children - - - - 511
See HUSBAND AND WIFE. 1.

PORTIONS—Charged on real estate—Marshalling
See ADMINISTRATION. 2. [482

POWER—*Will—Power of Appointment up to specified Amount—General Devise and Bequest—Exercise of Power to full Amount—Wills Act* (1 *Vict. c.* 26), *s.* 27.] A testator by his will, dated in 1884, after giving his residuary real and personal estate upon certain trusts for the benefit of his widow and his daughter and the daughter's children, empowered his widow by will to appoint that any sum or sums of money not exceeding £20,000 should after her death be raised and applied as she should think fit.—The widow by her will, dated in 1885, devised and bequeathed all her estate and effects real and personal which she might die possessed of or entitled to unto her daughter absolutely:—*Held*, that by force of the 27th section of the Wills Act, the general devise and bequest in the widow's will operated as an exercise to the extent of £20,000 of the power of

POWER—*continued.*
appointment contained in the will of the testator. *In re* Jones. Greene *v.* Gordon - - 65

2. —— *Special Power of Appointment — General Devise—Residuary Devise—Specific Gift.*] The question whether, since the Wills Act, a special power of appointing real estate is exercised by a general devise, where the testator had neither at the date of his will nor of his death any real estate of his own, is one of intention to be inferred from the words of the will and from the surrounding circumstances at the date of it, particularly the enlarged operation given by the Act to a general devise. A testator making a mere general devise, though having no real estate of his own, does not thereby sufficiently indicate an intention of exercising a special power of appointing real estate, notwithstanding that objects of the power happen to be included among the devisees. *In re* Mills. Mills *v.* Mills 186

POWER—Appointment of new trustees - 370
See Settlement. 1.

—— Appointment—Non-existent power - 160
See Election.

—— Of sale—Bill of sale - - - 698
See Bill of Sale.

PRACTICE — *Administration Action — Further Consideration—Accounts and Inquiries—Absent Parties—Class Representation—Notice of Proceedings—Affidavits on Further Consideration—Rules of Supreme Court*, 1883, *Order* xvi.; xxxvii., *r.* 1; lv., *r.* 33.] Persons interested in an estate the subject of an administration action to which they had not been made parties, and whose rights or interests may be affected by an order directing accounts and inquiries, are not bound by the proceedings under that order—at any rate where they ought to be served—unless they are served with notice of the order, or an order has been made appointing a member of their class to represent them in the action.—The practice of the Court as to binding absent parties in an administration action discussed.—Under Order xxxvii., rule 1, the Court may, in an administration action, and after the Chief Clerk has made his certificate, receive, if it thinks fit, fresh affidavit evidence on further consideration. May *v.* Newton - 347

2. —— *Appeal for Costs—Administration Actions by Residuary Legatee—Rules of Supreme Court*, 1883, *Order* lxv., *r.* 1.] An action was brought by a married woman and her infant children by their next friend against a trustee and executor, asking for administration of the trusts of a will and settlement, and for accounts of the principal and income of the trust property, making charges of misconduct against the Defendant and seeking to charge him with the costs of the action. At the trial an order was made for administering the trusts, with special inquiries as to the alleged acts of misconduct. On taking the accounts it appeared that the Defendant had before action given a correct account of the capital, but that in the accounts he had rendered of the income he had not accounted for nearly so much as he ought. The special cases of misconduct alleged against him were not substantiated. Kay, J., ordered the Plaintiff's costs relating to the income account, and the Defendant's costs of

PRACTICE—*continued.*
the rest of the action, to be taxed and set off against each other. The Plaintiffs appealed, asking that their costs, or at all events those incurred before the Rules of 1883, except those ordered to be paid by the Defendant, might be paid out of the trust property:—*Held*, that the order was not appealable, for that the costs of a hostile action, seeking to charge the defendant with costs on the ground of acts of misconduct, were not within the old rule of the Court of Chancery that the plaintiff in an administration action was entitled to costs out of the fund unless there were special grounds for depriving him of them, but were in the discretion of the Judge. Williams *v.* Jones [C. A. 120

3. —— *Appeal—Leave to appeal after Time—Amendment of Notice of Appeal—Informal Notice given within Time—Rules of Supreme Court*, 1883, *Order* lviii., *rr.* 2, 3, 15.] Within twenty-one days from the date of an order allowing a creditor's claim in an administration action the Defendant gave a four-day notice of appeal. After the time for appealing had expired the Respondent wrote to say that the notice was bad, as it ought to have been a fourteen days' notice. The Appellant thereupon gave notice of motion for leave to amend his notice of appeal by substituting the fourteen days' period for that of four. At this time more than fourteen days from the service of the notice of appeal had passed:—*Held*, that the notice of appeal was bad, for that it ought to have been a fourteen days' notice, and that leave to amend it in the way proposed ought not to be given after the fourteen days, but that as the applicant had given a distinct notice of appeal in proper time, the time for appealing ought to be extended. *In re* Crosley. Munns *v.* Burn [C. A. 664

4. —— *Attachment—Notice of Motion—Affidavits—Service—"Address for Service"—Irregularity—Setting aside Proceedings — Objections—Rules of Supreme Court*, 1883, *Order* iv., *r.* 1; xii., *r.* 10; lii., *r.* 4; lxvii., *r.* 2; lxx., *rr.* 1, 3 —*Sitting at "Royal Courts of Justice"—Sitting in Chambers.*] It is irregular under Rules of Supreme Court, 1883, Order lii., r. 4, not to serve with a notice of motion for attachment copies of the affidavits intended to be used on the motion: the copy affidavits, and the notice should be served together, and, if not served personally, at the address for service: Order iv., r. 1; xii., r. 10; lxvii., r. 2.—An irregularity committed in the course of any proceedings under the Rules of the Court does not necessarily render the proceedings void: under Order lxx., r. 1, the Court has power to condone the irregularity. Therefore, where an order for attachment for contempt of Court had been made against a Defendant on a motion the affidavits in support of which had not been served with the notice of motion, as required by Order lii., r. 4, the Court, being satisfied that a contempt had been committed, refused, in the exercise of the discretion conferred upon it by Order lxx., r. 1, to set it aside; but under the circumstances the Defendant, who was in prison under the attachment, was ordered to be released.—*Hampden* v. *Wallis* (26 Ch. D. 746) and *In re Wyggeston Arbitration* (33 W. R. 551) considered. A summons or notice

PRACTICE—*continued.*

of motion to set aside proceedings for irregularity should state the several objections on which the applicant intends to insist: Order LXX., r. 3.—A notice that the Court will be moved at the Royal Courts of Justice is sufficient, though the Judge be sitting in Chambers. PETTY *v.* DANIEL 172

5. —— *Garnishee—Equitable Charge—Notice—Priority—Partner.*] An equitable charge given before a garnishee order is obtained takes priority of the order even in absence of notice of the charge. BADELEY *v.* CONSOLIDATED BANK 536

6. —— *Next Friend — Married Woman — Guardian ad litem—Infant Defendant—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1—*Rules of Supreme Court*, 1883, *Order XVI., r.* 16.] The general rule that a married woman cannot act as a next friend or guardian ad litem has not been abrogated by the Married Women's Property Act, 1882, s. 1, sub-s. 2, which, in providing that she shall be capable of suing and being sued . . . . in all respects as if she were a feme sole, is limited to actions relating to herself personally. *In re* DUKE OF SOMERSET. THYNNE *v.* ST. MAUR - - - - - 465

7. —— *Notice of Motion—Notice of Appeal—Notice for a Day not in the Sittings.*] A notice of motion was given for a day not in the sittings of the Court:—*Held*, that the notice was good.—*Daubney* v. *Shuttleworth* (1 Ex. D. 53) overruled on this point. *In re* COULTON. HAMLING *v.* ELLIOTT - - - - - C. A. 22

8. —— *Particulars—Alleged False Entries.*] A company which had bought the business of the Defendants, and employed them to manage it, brought an action against them for an account of what was due from them under a guarantee that the profits should amount to a certain yearly sum. The statement of claim alleged that the Defendants had made false entries in the books for the purpose of making the working expenses appear less than they had been, and so relieving themselves of liability under the guarantee. The Defendants obtained an order for the Plaintiffs to furnish particulars of the false entries alleged. The Plaintiffs set out a list of the items complained of, transcribed from the books, with references to the parts of the books where they were found. The Defendants applied for further and better particulars. Kay, J., refused the application:—*Held*, on appeal, that as an entry might be wrong in different ways, the mere specification of the entries complained of did not give the Defendants sufficient information of the nature of the case they had to meet, and that the Plaintiffs must state shortly as to each item the general nature of the objection they made to it. NEWPORT (MON.) SLIPWAY DRY DOCK AND ENGINEERING COMPANY *v.* PAYNTER - C. A. 88

9. —— *Rectification of Order—Mistake—Misrepresentation—Trust—Solicitor.*] Where a wrong order has been made by reason of misrepresentation or mistake of fact, the error may be corrected by a new order made notwithstanding the former order.—A solicitor employed in trust business is the solicitor of the trustees personally, and has no direct claim on the trust estate for costs.—An order was made on a trustee to pay into Court interest found due from him, and the balance beyond his costs to be taxed of capital money certified to have come to his hands. The capital money had been received by the trustee's solicitors as part of the trust estate. The order was made on statements implying that the trustee, who was totally unable to pay, was solvent. The trustee having made default in payment of the interest, the Court made an order notwithstanding the former order that the solicitors should pay into Court the capital come to their hands with interest. STANIAR *v.* EVANS. EVANS *v.* STANIAR - - - - 470

10. —— *Striking out Pleading — Rules of Supreme Court*, 1883, *Order XXV., r.* 4—*Reasonable Cause of Action—Necessary Parties—Mining Lease—Lessor.*] In an action by a copyholder to restrain the working of coal under his land by A., who claimed to be entitled to do the acts complained of by virtue of a lease from B., the lord of the manor, B. was by amendment added as a Defendant, on the allegation that he claimed the right by himself and his lessees to work the coal; that he justified the acts of A., and that he had received and claimed to be entitled to receive from A. rents and royalties in respect of such wrongful working.—On summons by B. under Rules of Supreme Court, 1883, Order XXV., r. 4, that the amended statement of claim might be struck out as against him on the ground that it disclosed no reasonable cause of action against him, and that the action might be dismissed as against him:—*Held*, that the lessor had been properly added as a Defendant. SHAFTO *v.* BOLCKOW, VAUGHAN, & Co. - - - 725

11. —— *Third Party Procedure — Leave to defend Action—Interrogatories to Third Party—Rules of Supreme Court*, 1883, *Orders XVI., r.* 53; *XXXI., r.* 1.] Persons who had been served by a Defendant with a third party notice for the purpose of claiming indemnity, obtained an order (1) that the question of indemnity should be tried after the trial of the action; and (2), that they should be at liberty to appear at the trial of the action, and oppose the Plaintiff's claim so far as they were affected thereby, and for that purpose to put in evidence and cross-examine witnesses:—*Held* (affirming the decision of Kay, J.), that the third parties had put themselves in the position of "opposite parties" to the Plaintiff; and the Plaintiff had a right to examine them by interrogatories.—*MacAllister* v. *Bishop of Rochester* (5 C. P. D. 194) followed. EDEN *v.* WEARDALE IRON AND COAL COMPANY - - C. A. 223

12. —— *Third Party Procedure—Indemnity—Rules of Supreme Court*, 1883, *Order XVI., r.* 48.] A land company had an agreement from B. to demise to them certain lands for building purposes, the agreement to be voidable as to all land not actually demised if the buildings were not completed within a certain time. B. agreed to sell part of the land to a railway company subject to the building agreement. The time for building having expired without the buildings being erected, the railway company took possession and treated the building agreement as at an end. The land company thereupon brought their action against the railway company, alleging that an

PRACTICE—*continued.*
agreement had been made between them and B. for extension of the time, and that the railway company bought with notice of it, and seeking to restrain the railway company from interfering with the land till they had compensated the land company, pursuant to the Lands Clauses Act. The railway company applied for leave to serve B. with a third-party notice on the ground that he had sold to them free from all incumbrances, except the building agreement, and without notice of the extension of time, and was bound to indemnify them against any claim the land company could establish:—*Held*, by Chitty, J., and by the Court of Appeal, that in order to bring a case within Order XVI., r. 48, it is not enough that if the plaintiff succeeds the defendant will have a claim for damages against the third party, but the defendant must have against the third party a direct right to indemnity as such, which right must—generally, if not always—arise from contract express or implied, and that here there was no ground for implying such a contract.—The Court afterwards declined to allow the case to be re-argued on the ground that an enactment in the Conveyancing and Law of Property Act, 1881, had been overlooked. BIRMINGHAM AND DISTRICT LAND COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - - C. A. 261

13. —— *Writ specially indorsed—Summary Judgment—Rules of Supreme Court*, 1883, *Order III., r.* 6; *Order XIV., r.* 1.] A writ which claims foreclosure or sale and a receiver, besides payment of the debt and interest, is not specially indorsed so as to entitle the plaintiff to summary judgment on the claim for debt and interest. IMBERT-TERRY *v.* CARVER - - - 506

—— Mortgage—Foreclosure - 143, 195
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—— Partnership action—Judgment creditor 345
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—— Striking out pleadings - - 278
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PRINCIPAL AND AGENT—*Production of Documents to Persons appointed by Principal—Practice—Striking out Pleadings—Groundless Defence—Rules of Supreme Court*, 1883, *Order XXV., r.* 4.] A firm of merchants residing abroad brought an action against their agent in this country, claiming production of the documents relating to their business to a person appointed by them for that purpose. The Defendant put in a defence stating that the person appointed by the Plaintiffs was a clerk in a rival and unfriendly house of business, for which reason he objected to produce the documents to him, but that he was willing to produce them to any proper person. The Plaintiffs moved, under Order XXV., r. 4, to strike out the defence:—*Held* (affirming the decision of Chitty, J.), that although a principal had a general right to the production of documents in the hands of his agent to any person appointed by him, he cannot insist on their being produced to an improper person; and therefore the defence disclosed a reasonable answer to the claim.—Whether an action for the sole purpose of enforcing the production of documents to a particular person will lie, *quære*. DADSWELL *v.* JACOBS - - - C. A. 278

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SETTLED LAND ACT—*Copyhold—Vendor and Purchaser—Double Fine*—45 & 46 *Vict. c.* 38, *s.* 20.] A copyholder who had been admitted to the copyhold to him and his heirs died, leaving a will by which he devised it to trustees upon trust to pay the rents to his widow for life. Shortly after his death the widow sold the property under the powers of the Settled Land Act, 1882. The trustees had not been admitted. The lord of the manor claimed to be paid, in addition to the fine payable by a purchaser on admittance, the fine which would have been payable if the trustees had been admitted:—*Held* by Cotton and Bowen, L.JJ. (affirming the decision of Chitty, J.), dissentiente Fry, L.J., that the lord could only claim one fine. *In re* NAYLOR AND SPENDLA'S CONTRACT [C. A. 217

2. —— *New Trustee*—45 & 46 *Vict. c.* 38, *s.* 38—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 31.] One of two trustees appointed under sect. 38 of the Settled Land Act, 1882, desired to retire. The Court appointed a new trustee for the purposes of the Settled Land Acts in the place of the retiring trustee on an application made under that section:—*Quære*, whether sect. 31 of the Conveyancing Act, 1881, applies to trustees appointed for the purposes of the Settled Land Acts. *In re* WILCOCK - 508

3. —— *Person having the Powers of Tenant for Life*—45 & 46 *Vict. c.* 38, *s.* 2, *sub-s.* 7, *s.* 58, *sub-s.* 1, *division* 6.] A testator, who died in 1884, by his will made in 1874, devised his residuary real estate to trustees upon trust, during the period of twenty years after his death, out of the rents to manage and superintend his real estate, and improve the same, and to accumulate or invest in the purchase of land the unapplied part of the rents, and after the determination of the said term of twenty years to settle and assure the devised and purchased real estate to the uses and upon the trusts of an existing settlement under which the testator's son took certain estates as tenant for life:—*Held* (affirming the decision of Chitty, J.), that the testator's son, not having any estate or interest in possession until the determination of the term, had not during its continuance, the powers of a tenant for life under the Settled Land Act with respect to the hereditaments devised by the will. *In re* STRANGWAYS. HICKLEY *v.* STRANGWAYS - - C. A. 423

4. —— *Sale by Tenant for Life—Payment of Purchase-money into Court—Payment out to Trustees—Option of Tenant for Life—Power of Trustees to give Receipts—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 22 (*sub-ss.* 1, 2, 3), 40.]

SETTLED LAND ACT—*continued.*
In 1859 a suit was instituted for the administration of the estate of a testator, who had devised land in strict settlement. In 1886 the tenant for life sold the land under the provisions of the Settled Land Act. Trustees had previously been appointed by the Court for the purposes of the Act. The purchaser refused to complete his contract, unless the purchase-money was paid into Court, and an order was made on his application, with the consent of the tenant for life, giving him liberty to pay it in, and it was paid in accordingly:—*Held*, that, by consenting to the order for payment of the purchase-money into Court, the tenant for life had exercised the option, given to him by sub-sect. 1 of sect. 22 of the Act, of having the money paid either to the trustees of the settlement or into Court, and that the money could not, therefore, be paid out to the trustees, but must remain in Court, and be invested or applied under the direction of the Court.—*Semble*, that the power to give receipts, which is conferred on trustees by sect. 40 of the Act, extends to trustees appointed by the Court under sect. 38. Cookes *v.* Cookes - - - - 498

SETTLEMENT—*Power of Appointment of New Trustees*—"*Continuing Trustee*"—"*Contrary Intention*"—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 31, *sub-ss.* 1, 3, 6, 7.] On a summons under the Vendor and Purchaser Act, 1874, an objection was taken by a purchaser from trustees that an appointment of one of their number, under the power given by sect. 31 of the Conveyancing Act, 1881, in the place of a trustee who had been abroad for more than twelve months, was invalid because that trustee had not joined in making the appointment:—*Held*, that, there being no evidence that the absent trustee was either willing or competent to join in making the appointment, the objection could not be sustained. —The instrument creating a trust cannot be taken to have expressed a contrary intention within sub-s. 7 of sect. 31 of the Conveyancing Act, 1881, merely because it does not provide for filling up a vacancy in the number of the trustees upon the happening of an event not contemplated by the parties to that instrument.—*Semble*, that if a trust deed contained a power to appoint new trustees expressed in the same words as sub-s. 1 of sect. 31, without anything more, it would not be necessary that a retiring trustee should join in the appointment of his successor. In such a case the words "continuing trustee" would mean only a trustee who is to continue to act in the trusts after the completion of the appointment.—*Travis* v. *Illingworth* (2 Dr. & Sm. 344) and *In re Norris* (27 Ch. D. 333) approved.—Opinion of Bacon, V.C., in *In re Glenny and Hartley* (25 Ch. D. 611) dissented from. *In re* Coates to Parsons 370

2. —— *Rectifying Settlement—After-acquired Property—Agency of Father—Gifts by Father—Assent of Husband—Will of Father—Usual Form—Delay.*] In a marriage settlement of money given by the father of the wife and money belonging to the husband, there was also a covenant to settle the wife's after-acquired property on her for life and after her death, in default of issue, on her next of kin.—The settlement was drawn by the brother of the wife, who was a solicitor, and who

SETTLEMENT—*continued.*
settled the terms with the father and the husband but did not refer to her, and she was not informed of the terms. She was of age. The father afterwards made a will giving property to her.—There was no issue of the marriage, and fourteen years after the marriage the wife brought an action to have the settlement rectified:—*Held*, that the father could not be considered as an agent for his daughter so as to bind her as to the settlement:—*Held*, that, as there was nothing in the nature of a bargain with the daughter, the making of his will by the father did not affect her right to have the settlement rectified:—*Held*, that the settlement was in an unusual form:—*Held*, that as nothing would by the proposed rectification be given to the husband, his assent to the settlement did not affect the case:—*Held*, that, under the circumstances, she was not barred by her delay in applying to have the settlement rectified:—*Held*, that the settlement must be rectified by giving the wife a power of appointment by will over the after-acquired property, and giving it to her absolutely if she survived her husband. Tucker *v.* Bennett - - - - - 754

—— After-acquired property - - 227
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—— Infant under seventeen - - .467
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—— Preference shares - - 287, 307
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SOLICITOR—*Taxation—Common Order to tax—Retainer.*] The question of retainer can be raised on a common order to tax as to particular items or heads; but not as to the whole of a bill of costs.—A bill of costs was divided into general costs and costs relating to a particular matter. On a common order to tax:—*Held*, that the whole of the latter, except two small items, having been incurred without authority were properly taxed off. *In re* Herbert - - - - 504

2. —— *Bill of Costs—Taxation—Purchase—Statutory Title—Scale Charge—Percentage—"Investigating Title"—General Order under Solicitors' Remuneration Act*, 1881, *Schedule I., Part I.*] The Corporation of London resolved to purchase the Old Bankruptcy Court which, under sect. 68 of the Bankruptcy Act, 1861, was vested in the Public Work Commissioners, the purchase-money, £93,500, being payable out of funds in Court under various Acts, including the Lands Clauses Act, and representing lands of the Corporation taken by certain public bodies. On applying to the Commissioners the Corporation were informed that the property was vested in the Commissioners under the above section, and that they "did not agree to furnish any evidence of title," but would apply to the Lord Chancellor, under the section, for his authority to sell; and they subsequently wrote that the Lord Chancellor had authorized the sale by his secretary. The City Solicitor, however, having regard to the terms of the section, required a written authority signed by the Lord

SOLICITOR—*continued.*

Chancellor himself, which was duly obtained. The solicitor, having thus satisfied himself as to the Commissioners' title, obtained, on summons in Chambers, an order sanctioning the purchase, the Chief Clerk, upon the production of the Lord Chancellor's authority and at the request of the solicitor, dispensing with the usual reference as to title. The purchase having been completed, the Corporation carried in their solicitor's bill for taxation, containing a charge of £278 15s., according to the scale in Schedule I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881, for "investigating title and preparing and completing conveyance." The Taxing Master disallowed the charge on the ground that there had been no investigation of title, and that therefore the scale charge did not apply: *In re Lacey & Son* (25 Ch. D. 301).—On a summons by the Corporation to review the taxation:—*Held*, that there had been an "investigation of title" within the terms of the General Order, and that therefore the scale charge applied. *Ex parte* MAYOR OF LONDON - - - - - 452

3. —— *Bill of Costs—Taxation—Election—"Undertaking any Business"—"Client"—Lease—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 1, *sub-s.* 3—*General Order under Solicitors' Remuneration Act*, 1881, *rr.* 2, 6: *Sched. I., Part II.*] The solicitors of the assigns of a lease of copyhold land wrote to P., the copyholder, asking for renewed leases to their clients under a covenant in the original lease. On the 25th of July P.'s solicitors wrote to the solicitors of the applicants stating that P. had called on them with the letter, and that the matter therein referred to should have their attention, and asking for evidence of the title of the applicants. The evidence required was furnished. Some delay took place in consequence of the necessity of P. being admitted, and obtaining a license to demise. On the 16th of October P.'s solicitors were informed by the steward of the manor that P. could be admitted, and that license to demise would be given. On the 19th of October P.'s solicitors gave him written notice of their election to be remunerated according to the old system as modified by Schedule II. to the rules under the Solicitors' Remuneration Act. In the books of the solicitors was an entry under that date "instructions for drawing new leases," but there was no evidence as to the circumstances under which it was made. On the 21st of October P.'s solicitors sent to the applicant draft leases. The leases were granted, and the lessees, who were bound to pay the costs of the lessors' solicitors, insisted that the remuneration must be according to the scale in Schedule I.:—*Held*, by the Court of Appeal (affirming the decision of Kay, J.), that the election on the 19th of October was too late, for that the business had been undertaken on the 25th of July, and that the taxation must be according to the scale.—*Held*, by Kay, J., that where, under a lease containing a power of renewal, the assigns are liable to pay the costs of a new lease, the only person to whom any notice of election under rule 6 need be given by the lessor's solicitor is the lessor himself: the assigns not being "clients" of the solicitor within sect. 1, sub-s. 3, of the Solicitors'

SOLICITOR—*continued.*

Remuneration Act, 1881, so as to make any notice to them necessary. *In re* ALLEN - C. A. 433

4. —— *Bill of Costs—Taxation—Election—Notice—"Undertaking any business"—"Client"—Mortgagee—Subsequent Incumbrancer—Mortgagor—General Order under Solicitors' Remuneration Act*, 1881, *rr.* 6, 8.] The notice of election under rule 6 of the General Order to the Solicitors' Remuneration Act, 1881, must be given by the solicitor before he undertakes any business at all in the particular matter for his client. After having done any work in the matter for which he could charge his client if the scale under the Order did not apply, it is too late for him to elect. —*In re Allen* (34 Ch. D. 433) followed.—Per Kay, J.: Where notice of election under the rule has been properly given by a solicitor to his client, a first mortgagee, it is binding on a subsequent incumbrancer and also on the mortgagor.—A solicitor who acted for a mortgagee in relation to the mortgaged property received from the solicitors of the persons entitled to the equity of redemption a request that the mortgagee would sell under his power of sale, and in pursuance of this he, without any express authority from his client, did work in relation to the contract for sale for which if authorized he would, apart from the rules, under the Solicitors' Remuneration Act, have been entitled to be paid, and which would be covered by the scale fee. The sale was completed:—*Held*, (affirming the decision of Kay, J.), that a notice of election to be remunerated according to the old system, which was given by the solicitor after work of the above description had been done, was too late, although given before the contract was signed, for that as the client had ratified his proceedings he stood in the same position as if he had received previous authority, and must be treated as having undertaken the business as soon as he did any work of the above description.—The Taxing Master having taxed according to the scale, an objection was taken, solely grounded on the notice to elect:—*Held*, that the Court could not enter upon the question whether there had been an agreement between the mortgagee and his solicitor that the latter should be remunerated according to the old system. —Whether, if the right to elect was gone, any such agreement would bind the parties entitled to the equity of redemption, *quære*. HESTER *v.* HESTER - - - - C. A. 607

5. —— *Lien—Property "recovered or preserved" in Action—Solicitor discharged before Trial—Charging Order under Attorneys and Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Action continued and concluded by new Solicitor—Costs.*] The solicitor who had acted for the Plaintiff in the institution and conduct of an action to establish his right to a sum of money was discharged by the client shortly before the trial. The action was continued by new solicitors on behalf of the Plaintiff, and judgment was delivered in favour of the Plaintiff ordering the Defendant to pay him the money. After the trial the former solicitor obtained, under the Attorneys and Solicitors Act, 1860, s. 28, a declaration of charge upon the sum recovered, "subject to the lien of the present solicitors of the Plaintiffs upon

SOLICITOR—*continued.*
the said sum":—*Held*, that the solicitor who was solicitor at the time the fund was recovered was entitled to a first charge thereon for all his taxed costs of the action, and subject thereto that the discharged solicitor was entitled to such lien as he obtained under his charging order.—*Cormack* v. *Beisly* (3 De G. & J. 157) followed. *In re* Wadsworth. Rhodes *v.* Sugden - - - 155

—— Fiduciary position—Statute of Limitations *See* Limitations, Statute of. 4. [462

—— Trust business—Lien on trust fund - 470 *See* Practice. 9.

—— Trustee—Professional charges - 77, 675 *See* Trustee. 2, 3.

SPECIFIC PERFORMANCE—Non-mutuality 569 *See* Vendor and Purchaser. 3.

—— Rectification of agreement - - 367 *See* Mistake.

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STATUTE—Incorporation of public with special Act - - - - - 24 *See* Lands Clauses Act.

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11 Geo. 4 & 1 Will. 4, c. 47, ss. 6, 8—*Fraudulent Devises* - - - - 379 *See* Administration. 1.

3 & 4 Will. 4, c. 27, s. 6—*Limitations* 558, 560, n. *See* Limitations, Statute of. 1.

—— —— s. 42 - - - - 721 *See* Limitations, Statute of. 3.

3 & 4 Will. 4, c. 105, s. 9—*Dower* - 166 *See* Dower.

1 Vict. c. 26, s. 15—*Wills* - - - 357 *See* Will. 7.

—— —— s. 27 - - - - 65 *See* Power. 1.

3 & 4 Vict. c. 87, s. 49—*Metropolis Improvement* - - - - - 24 *See* Lands Clauses Act.

8 & 9 Vict. c. 16, s. 41—*Companies Clauses* 730 *See* Company. 3.

8 & 9 Vict. c. 18—*Lands Clauses* - 24 *See* Lands Clauses Act.

9 & 10 Vict. c. 34, s. 18—*Spitalfields Improvement* - - - - - 24 *See* Lands Clauses Act.

13 & 14 Vict. c. 60, ss. 2, 34—*Trustees* - 618 *See* Trustee Acts. 3.

—— —— s. 3 - - - - 663 *See* Trustee Acts. 4.

—— —— s. 32 - - - 209, 211 *See* Trustee Acts. 1, 2.

15 & 16 Vict. c. 85, ss. 32, 52—*Burials* - 314 *See* Burial Ground.

16 & 17 Vict. c. 134—*Burials* - - 314 *See* Burial Ground.

18 & 19 Vict. c. 43, s. 4—*Infants' Settlement* *See* Infant. 2. [467

23 & 24 Vict. c. 127, s. 28—*Solicitors* - 155 *See* Solicitor. 5.

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25 & 26 Vict. c. 86, ss. 12, 13—*Lunacy Regulation* - - - - - 603 *See* Lunatic.

25 & 26 Vict. c. 89, ss. 87, 163—*Companies* 646 *See* Company. 11.

—— —— ss. 93, 161 - - - 14 *See* Company. 12.

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—— —— s. 12 - - - - 379 *See* Administration. 1.

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40 & 41 Vict. c. 26—*Companies* - 287, 307 *See* Company. 5, 6.

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44 & 45 Vict. c. 44—*Solicitors' Remuneration* *See* Solicitor. 2. [452

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45 & 46 Vict. c. 38, s. 20—*Settled Land* 217 *See* Settled Land Act. 1.

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TENANT FOR LIFE—*Remainderman—Leaseholds—Repairs—Trustees—Power of Sale—Jurisdiction of Court to interfere with Discretion of Trustees.*] A testator gave leaseholds, some of which were held on short terms, to two trustees, one of whom was his wife, upon trust for his wife for life, and after her death upon trust that the whole should be sold, and the proceeds divided between four persons. And he authorized his trustees, provided they should deem it advisable, to sell his short leaseholds and invest the proceeds and allow his wife to receive the income during her life.—The leaseholds were in a bad state of repair at the death of the testator; the widow kept them up in the same state of repair, but declined to do more than this. The remaindermen applied for an order to oblige the tenant for life to maintain the leaseholds in such a state of repair as to satisfy the covenants in the leases, so as to avoid a forfeiture, or else to concur in selling the short leaseholds:—*Held* (affirming the decision of Bacon, V.-C.), that there was no obligation on the tenant for life to put the premises in such a state of repair as to comply with the terms of the leases.—*In re Fowler* (16 Ch. D. 723) distinguished.—*Held*, also, that the Court had no jurisdiction to interfere with the discretion of the widow, who had then become surviving trustee, and to order her to exercise her power of selling the leaseholds.—*Tempest* v. *Lord Camoys* (21 Ch. D. 576, n.) distinguished. *In re* COURTIER. COLES *v.* COURTIER. COURTIER *v.* COLES - C. A. 136
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TENANT IN COMMON—Mortgage in name of several persons - - - 732
See MORTGAGE. 3.
TENANT IN TAIL — *Further Assurance — Base Fee—Future Estate.*] On a sale by a tenant in tail in remainder who had disentailed without the concurrence of the tenant for life, the tenant in tail covenanted that he would execute every such disentailing and other assurance for further or more perfectly assuring the premises as the purchaser should reasonably require:—*Held*, on the construction of the whole deed, that under this covenant the tenant in tail was bound to execute a disentailing deed after the death of the tenant for life.—*Davis* v. *Tollemache* (2 Jur. (N.S.) 1181) observed upon. BANKES *v.* SMALL - 415
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TITLE OF HONOUR — Person holding—Will—Lapse - - - - 446
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TRADE—Carried on by administrator—Lien 597
See ADMINISTRATION. 4.
—— Injury to—Libel - - - 198
See LIBEL.

TRADE-MARK—*Registration*—"*Fancy word not in common use*"—*Geographical Word—Patents, Designs, and Trade Marks Act*, 1883, *s.* 64, *sub-s.* 1 (*c*).] The fanciful or abnormal use of a word not in itself obviously non-descriptive, does not make it a "fancy word" within the Patents, Designs, and Trade Marks Act, 1883, s. 64, sub-s. 1 (*c*), so as to be capable of registration as a trade-mark. And in order to obtain registration of a word as having become "distinctive" within sect. 64, sub-sect. 3, by user or recognition in the trade, such user or recognition must have been prior to August, 1875.—Accordingly applications for a direction to the Comptroller-General to proceed with the registration as trade-marks of the words "Melrose Favourite Hair Restorer" and "Electric Velveteen," the use of which by the applicants would, independently of the Act, by user and recognition in the trade since August, 1875, have been entitled to protection, were, in both cases, reversing Bacon, V.-C. (see W. N. 1886, p. 135, and 33 Ch. D. 477), refused.—*In re Trade-mark "Alpine"* (29 Ch. D. 877) questioned. *In re* VAN DUZER'S TRADE-MARK. *In re* LEAF, SONS, & CO.'S TRADE-MARK - - C. A. 623
TRIAL—Patent action—Vivâ voce evidence 396
See PATENT. 3.

TRUSTEE — *Negligence — Mortgage of Houses—Insufficient Security — Valuation — Rules as to Amount to be advanced.*] Trustees having power to make investment of trust moneys upon securities in E. and W., including leaseholds for terms of years, invested trust moneys upon mortgage of a leasehold property which consisted of cottages. The evidence shewed that a proper valuation of the property was not obtained by the trustees, and that the sum advanced by them was about two-thirds of the real value of the property, which subsequently became depreciated:—*Held*, that the investment was not fit and proper for the trustees to make, that the trust moneys were

TRUSTEE—*continued.*

advanced upon an insufficient security, and that the trustees must make good the loss which had been occasioned to the trust estate.—The rule to be followed by trustees in making advances upon mortgages explained. *In re* Olive. Olive *v.* Westerman - - - - - 70

2. —— *Solicitor — Profit Costs — Administration.*] A testatrix, after appointing V. and H., who was a solicitor and also one of the attesting witnesses to the will, executors and trustees of her will, declared that H. should be entitled to charge and to receive payment for all professional business to be transacted by him under the will in the same manner as he might have done if he had not been an executor.—V. proved the will, and a creditor's action was instituted against her. V. employed the firm of solicitors in which H. was a partner as her solicitors in the action.—H. afterwards proved the will, and was made a Defendant to the action.—When the action came on for further consideration, a question arose whether H. was entitled to his profit costs, and an order was made declaring that he was not entitled to claim payment of profit costs by virtue of the declaration in the will, he being one of the attesting witnesses thereto, such declaration to be without prejudice to any of his rights apart from the clause in the will.—The Taxing Master disallowed H.'s profit costs of action, on the ground that he was a solicitor-trustee, and as such not entitled to make a profit out of his trust:—*Held*, on a summons to review the taxation, that H. was entitled to profit costs of action, but that he was not entitled to profit costs for business not done in the action, and that the rule applied as well to costs incurred before as after he proved the will.—*Cradock* v. *Piper* (7 Mac. & G. 664) discussed, and held not to have been overruled.—*Broughton* v. *Broughton* (5 D. M. & G. 160) also discussed. *In re* Barber. Burgess *v.* Vinicome - - 77

3. —— *Solicitor — Profit Costs—Acting for other Trustees—Preparing Leases—Fees of Steward of Manor.*] E., a partner in a firm of country solicitors, was one of two trustees of a will which contained no power to charge for professional services.—E. and his co-trustee were respondents to an application for maintenance by a next friend on behalf of an infant under the summary procedure of the Court, and E.'s firm, through their London agents, acted as solicitors for E. and his co-trustee and made profit costs:—*Held*, that E.'s firm were entitled to receive those profit costs as coming within the exception laid down in *Cradock* v. *Piper* (1 Mac. & G. 664). Although that case has been often disapproved, it has been so long acted on as a binding authority that it ought not now to be overruled. The exception applies not only to proceedings in a hostile suit, but to friendly proceedings in Chambers, such as an application for maintenance of an infant.—After the death of E.'s co-trustee, E. was made Defendant to an administration action in which a receiver was appointed, and E.'s firm, through their London agents, acted for the receiver and made profit costs:—*Held*, that these profit costs could not be retained by the firm; on the principle that a trustee must not place himself in a position in which his interest conflicts with his duty.—E. and his firm made profit costs by preparing leases and agreements for leases of portions of the trust estate, which costs were paid by the lessees:—*Held*, that although the costs were paid by the lessees, the solicitors were employed on behalf of the trust estate, and that E. and his firm must account to the estate for the costs.—E. and his co-trustee appointed E.'s partner steward of a manor which formed part of the trust estate, and fees for manorial business were paid to the steward by the tenants and brought into the partnership accounts:—*Held*, that the fees, not being received by the steward in his character of solicitor, were not liable to be accounted for to the trust estate. *In re* Corsellis. Lawton *v.* Elwes - 675

—— Appointment of - - - 370
See Settlement. 1.

—— Appointment—Trustee Acts 209, 211, 618
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—— Appointment of—Settled Land Act—Conveyancing Act - - - 508
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TRUSTEE ACTS—*Appointment of New Trustees—Appointment of Additional Trustee when no Vacancy—Trustee Act*, 1850 (13 *&* 14 *Vict. c.* 60), *s.* 32—*Conveyancing Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 31, *sub-s.* 2.] *Held*, that under sect. 32 of the Trustee Act, 1850, the Court has jurisdiction to appoint an additional trustee, even though there is no vacancy in the trusteeship.—*In re Brackenbury's Trusts* (Law Rep. 10 Eq. 45) followed.—*Semble*, that the power conferred by subsect. 2 of sect. 31 of the Conveyancing Act, 1881, to increase the number of trustees, "on an appointment of a new trustee," only arises when an appointment is being made to supply a vacancy in the trusteeship. *In re* Gregson's Trusts 209

2. —— *Appointment of New Trustees—Separate Sets of Trustees for distinct Trusts—Trustee Act*, 1850 (13 *&* 14 *Vict. c.* 60), *s.* 32—*Conveyancing Act*, 1882 (45 *&* 46 *Vict. c.* 39), *s.* 5.] Under the trusts of a will different parts of the testator's property were subject to distinct trusts, but in a certain event the trusts would coalesce:—*Held*, that there was power to appoint separate sets of trustees for the different parts of the property. *In re* Hetherington's Trusts - - - 211

3. —— *Appointment of New Trustee—Vesting Order—Jurisdiction—"Person of unsound mind"—Trustee Act*, 1850 (13 *&* 14 *Vict. c.* 60), *ss.* 2, 34.] A person is of "unsound mind" within the meaning of the Trustee Act, 1850, where from permanent incapacity of mind he is incapable of managing his affairs, though his state of mind is not such that he would be found lunatic on inquisition.—*In re Phelps' Settlement Trusts* (31 Ch. D. 351) not followed.—North, J., in an action in

TRUSTEE ACTS—*continued.*

he Chancery Division, gave a judgment removing trustee of unsound mind and appointing a new rustee in his place, but declined to make an order nder sect. 34 of the Trustee Act, 1850, vesting he estate in the new trustee, considering that it ought to be applied for in Lunacy. The Lords Justices sitting in Lunacy made the vesting order. *In re* MARTIN'S TRUSTS. LAND, BUILDING, INVESTMENT, AND COTTAGE IMPROVEMENT COMPANY *v.* MARTIN. *In re* MARTIN C. A. 618

5. —— *Mortgagee of unsound Mind—Appointment of Person to convey—Transfer of Mortgage—Trustee Act*, 1850, *s.* 3.] Where a person of unsound mind is possessed of an estate by way of mortgage, the Court can, under the Trustee Act, 1850, sect. 3, appoint a person to convey the estate for the purpose of effectuating a transfer of the mortgage. *In re* NICHOLSON - C. A. 663

UNCERTAINTY—Measurement of land - 569
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VALIDITY—Bill of sale - - - 698
See BILL OF SALE.

VENDOR AND PURCHASER—*Conditions of Sale—Interest.*] Where there is a condition that the purchaser shall pay interest from the day fixed for completion in case of delay from any cause "except the wilful neglect or default of the vendor," the purchaser cannot relieve himself from the liability to pay interest by setting apart the unpaid purchase-money and giving the vendor notice of such appropriation.—*In re Golds and Norton's Contract* (33 W. R. 333) not followed. *In re* RILEY TO STREATFIELD - - 386

3. —— *Contract — Specific Performance — Statute of Frauds—"Vendor"—Name of "Vendor's Solicitor"—Solicitor himself the Vendor—Insufficient Description.*] If, in a contract for sale, the vendor is described simply as "proprietor," "owner," "mortgagee," or the like, the description is sufficient to satisfy the requirements of the Statute of Frauds; but not so if he is described as "vendor," or "client" or "friend" of a named agent, or as "solicitor to the vendor," even where the solicitor is himself the vendor and is described in the contract as "A. B. solicitor to the vendor."—*Semble*, a mere reference in a condition of sale to a conveyance or other document of title relating to the property, the name or description of the vendor not being stated in the condition, is not sufficient to import its contents into the contract so as to satisfy the requirements of the Statute of Frauds, even if such conveyance or other document does shew who is the vendor.—A contract which, under the Statute of Frauds, is invalid through not naming or sufficiently describing the vendor, is not rendered valid by the fact that the purchaser knew, at the time he entered into the contract, who the vendor was. JARRETT *v.* HUNTER - - - - 182

3. —— *Contract—Specific Performance—Non-mutuality—Power to withdraw—Land indefinite—Land belonging to Another—Statute of Frauds*

VENDOR AND PURCHASER—*continued.*

—*Two Letters forming Contract—Parol Evidence.*] A proposal had been made that the two Plaintiffs should buy a triangular field of about three acres, and that the Defendant should buy half an acre of it from them. One of the Plaintiffs and the Defendant met on the field; the Defendant wished to have a piece in one of the angles, and the Plaintiff stepped so as to mark out where a base line would cut off half an acre. Some days afterwards the same Plaintiff wrote to the Defendant asking her to let them have a letter agreeing to purchase the half acre she had selected for £350. She wrote back, not expressly referring to the other letter, that she was willing to take half an acre of the land as agreed upon for £350. The Plaintiffs did not obtain a contract with the owner of the land for the purchase until the 4th of November, which was three months afterwards. On the 13th of November the Defendant threatened to withdraw, and on the 20th of November her solicitors wrote that she did withdraw from the contract:—*Held*, that the small element of uncertainty in the measurement of the land might be disregarded, and that the parties must be considered as having determined the exact piece of land to be taken:—*Held*, that the second letter contained a sufficient reference to the first; and that the two letters formed a valid contract within the Statute of Frauds:—*Held*, that though the two Plaintiffs were the purchasers of the land, and the letters forming the contract passed between the Defendant and one only of the Plaintiffs, he must under the circumstances be considered as agent for the other as well:—*Held*, that the doctrine of non-mutuality being a bar to specific performance, does not apply to a contract which to the knowledge of both parties cannot be enforced by either until the occurrence of a contingent event, and therefore:—*Held*, that though the Defendant might have withdrawn at any time before the 4th of November when the Plaintiffs first became able to perform their part, she could not withdraw afterwards. WYLSON *v.* DUNN - - 569

VESTING ORDER - - - - 618
See TRUSTEE ACTS. 3.

WILL—*Construction—Condition Precedent—Administration Order.*] A testator bequeathed his residuary personal estate to such persons who should within one year from his death establish their right or title thereto as his next of kin, with a gift over in default. An order for limited administration, including an inquiry as to next of kin, was made on summons shortly after the testator's death. The persons who were next of kin did not bring in a claim within the year:—*Held*, that the gift over took effect.—*Tollner* v. *Marriott* (4 Sim. 19) distinguished. *In re* HARTLEY. STEDMAN *v.* DUNSTER - - - 742

2. —— *Construction—Gift at Twenty-five—Contingent Gift—Remoteness—Separate Fund—Gift over.*] A testatrix by her will, dated in 1828, gave all her property to trustees upon trust, as to the interest of a sum of £5000, for her sister for life; and after the death of such sister the interest to be paid to the testatrix's daughter (she having first attained twenty-five): if the daughter married with the consent of the executors, and died "leaving children, the interest to be appro-

WILL—*continued.*

priated for the maintenance and education of such children," of whom the testatrix constituted the executors guardians as to the due application of the same according to their discretion, "and the principal to be divided amongst them as they shall severally attain the age of twenty-five years;" after the death of the sister and in the event of the daughter marrying without consent, or marrying with consent "and dying without leaving issue," then over.—The daughter survived the testatrix, attained twenty-five, and in 1842 married with the necessary consent. The sister died in 1854, and the daughter in 1886, having had two children, who survived her:—*Held*, that the gift was not void for remoteness, but that the fund vested in the children of the daughter living at her death. *In re* BEVAN'S TRUSTS 716

3. —— *Construction—Gift during Widowhood—Gift over on Death.*] Gift by will to testator's widow A. during her life provided she remained a widow; and from and after her death or remarriage, to B. absolutely, with provisions for maintenance in case B. should not have attained twenty-one at the death or remarriage of A. In the event (which happened) of B. dying during the lifetime of A., then at the death of A. the property was given over to testator's brothers and sisters who should be living at A.'s death.—B. died an infant and afterwards A. married again:—*Held*, that upon such remarriage the gift over in favour of testator's brothers and sisters took immediate effect, and was not postponed until A.'s death. STANFORD *v.* STANFORD - - 362

4. —— *Construction—Gift to a Person holding a Title—Lapse—Heirloom.*] A testator bequeathed a silver cup to Lord S. and his heirs for an heirloom. The person who was Lord S. at the date of the will died before the testator leaving a successor to the title:—*Held* (affirming the decision of North, J.), that the bequest lapsed. *In re* WHORWOOD. OGLE *v.* LORD SHERBORNE C. A. 446

5. —— *Construction—Misdescription—Cousin—Parol Evidence.*] A testatrix gave a share of her residue to her "cousin, Harriet Cloak." She had no cousin of that name, but she had a married cousin, Harriet Crane, whose maiden name was Cloak; and she had a cousin, T. Cloak, whose wife's name was Harriet:—*Held*, that extrinsic evidence was admissible to shew the testatrix's knowledge of and intimacy with the members of the Cloak family.—And *held*, by the Court of Appeal (dissentiente Bowen, L.J.), reversing the decision of Pearson, J., that "cousin" might be understood in a popular sense as the wife of a cousin; and that Harriet, the wife of T. Cloak, was entitled to the share of the residue.—*Grant* v. *Grant* (Law Rep. 5 C. P. 727) distinguished. *In re* TAYLOR. CLOAK *v.* HAMMOND - C. A. 255

6. —— *Construction—Misdescription—Lease.*] A testator gave the lease of the house in which he should be living at the time of his decease to his wife. At the date of the will he was living in a house he held for a short term at rack-rent; he subsequently bought and went to reside at a freehold house, where he died:—*Held*, that the freehold house was not devised to the testator's widow. *In re* KNIGHT. KNIGHT *v.* BURGESS - 518

WILL—*continued.*

7. —— *Construction—Void Life Interest—Acceleration—Wills Act* (1 *Vict. c.* 26), *s.* 15.] Gift by will of real and personal estate upon trust to convert and pay the income of the proceeds to A. for life, and after A.'s death to pay the capital and income thereof unto the child or children of A. in equal shares, with gifts over in case A. should die without leaving issue living at his death.—The will had been attested by A.'s wife, so that the gift of a life interest to him was void under sect. 15 of the Wills Act. There were no children of A.'s marriage. The personal estate was exhausted and the trust funds represented real estate only:—*Held*, that until A. had a child the gifts upon the determination of A.'s life estate could not be accelerated, and that during the life of A., and so long as he had no children, the income of the trust funds was undisposed of, and belonged to the heir-at-law, and could not be accumulated for the benefit of the persons contingently entitled in remainder.—*Jull* v. *Jacobs* (3 Ch. D. 703) distinguished.—*Hodgson* v. *Earl of Bective* (1 H. & M. 376) and *In re Dumble* (23 Ch. D. 360) explained. *In re* TOWNSEND'S ESTATE. TOWNSEND *v.* TOWNSEND - - - 357

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STAMFORD STREET AND CHARING CROSS